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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

S. E. NICHOLS OF OHIO, INC.,

Petitioner,

—VS.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented

1. Where a court of appeals held that it must uphold the NLRB's findings of fact concerning a constructive discharge of an employee "as long as those findings are supported by substantial evidence in the record as a whole" but gave no indication whatsoever that it had taken into account the evidence that detracted from the NLRB's position or the evidence from which conflicting inferences could be drawn, did the court of appeals fulfill its obligation to view the record in its entirety "including the body of evidence opposed to the Board's view" as required by this Court's decision in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488-489 (1951)?

2. Whether, as a matter of law, a discharged employee used "reasonable efforts" to obtain substantially equivalent interim employment when it is undisputed that the employee during an eight-year backpay period (i) applied for only one job through the local newspaper want ads that contained numerous suitable employment opportunities; (ii) failed to use a private employment agency and did not apply for a single job through the state employment bureau; (iii) succeeded in obtaining only one employment which she quit after a brief six month period; and (iv) from 1971 through 1974 searched for employment on approximately 10% of the business days in each year and from 1974 through 1979 searched for employment on approximately one day per month?

3. Is this Court's review necessary to protect petitioner's due process right to a fair hearing where an administrative law judge refused to admit into the hearing record relevant evidence, including admissions against interest made by the charging party and the Board's agents and where the NLRB and the court of appeals refused to address petitioner's due process contentions?

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—VS.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner S.E. Nichols of Ohio, Inc., ("Nichols") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 15, 1983 enforcing an order of the National Labor Relations Board ("NLRB" or the "Board") entered against Nichols on September 18, 1981.

Opinions Below

The opinion of the Court of Appeals is reported at 704 F.2d 921 (6th Cir. 1983), and appears in the appendix hereto ("App.") at 1a. The opinion of the NLRB is reported at 258 NLRB No. 2, 1981 and appears at App. 8a. That opinion affirmed the decision of an Administrative Law Judge (the "ALJ") which appears at App. 16a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 15, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Section 10(c) of the National Labor Relations Act, in pertinent part, provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter; *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

29 U.S.C. § 160(c).

Section 10(e) of the National Labor Relations Act, in pertinent part, provides:

> The Board shall have power to petition any court of appeals of the United States, . . . for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

> agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. . . .

29 U.S.C. §160(e).

Statement of the Case

This petition brings to this Court for review a consolidated proceeding launched by respondent NLRB against petitioner Nichols. The consolidated proceedings resulted in the issuance of the Board's supplemental order and decision dated September 18, 1981 (App. 8a).

The Board applied to the United States Court of Appeals for the Sixth Circuit for enforcement of the Board's order. Nichols answered and cross-petitioned. By decision filed April 15, 1983 the Court of Appeals granted enforcement (App. 1a).

(1) The Consolidated Proceedings

The Unfair Labor Practice Proceeding

Nichols operates a self-service, retail discount department store with approximately 120,000 square feet of selling space, in New Philadelphia, Ohio. On April 19, 1979 Nichols' employee Lena Barnhart ("Barnhart") filed an unfair labor practice charge (Case No. 8-CA-12772), claiming only that she had been constructively discharged following her February, 1979, reemployment. One month later she withdrew this charge.

On or about June 12, 1979—after the Board instituted the supplementary back pay proceeding hereinafter described—Barnhart once again filed an unfair labor practice charge, which was identical to the one she had filed in April and withdrawn. This charge was assigned Case No. 8-CA-12909.

The complaint that the Board issued four months later on October 15, 1979, based upon the latter charge, alleged that Nichols had refused to reinstate Barnhart to her former position because of her alleged involvement in protected activities and because she had given testimony in prior Board proceedings.*[1] In addition, it alleged that, on February 17, 1979, Nichols improperly reinstated Barnhart and that, on or about March 19, 1979, she was constructively discharged. As above noted, in the charge that she had filed Barnhart only asserted a claim for constructive discharge and did not assert any claim that she had been improperly reinstated.

On October 25, 1979, Nichols filed its answer containing several affirmative defenses, including the following: (a) that Barnhart was properly and fully reinstated on February 27, 1979; (b) that Barnhart quit Nichols' employ on March 19, 1979 without justification; (c) that Barnhart was engaged in a scheme to obtain monies from Nichols without performing any work; and (d) that the Board by its conduct and procedures, is biased against Nichols and has deprived Nichols of its rights to due process, to a fair hearing, and to equal protection of the laws.

The Back Pay Proceeding
(NLRB Case Nos. 8-CA-6414, 7858, 9160)

On April 19, 1979, the Board's Regional Director had issued back pay specifications which contained a notice of hearing for

1*There had been no union activity at the store for years—the Record is barren of any attempt at the hearing to show that Barnhart's quit had any relationship to "protected activities" or prior testimony. For how long is the Board to be permitted to rely upon such unsupported, unprovable assertions. Neither the Union nor the employees raised these contentions as to the 1979 reinstatement.

August 7, 1979. In this proceeding the Board sought back pay (i) for Carolyn Moore ("Moore") in the sum of $24,846.36 plus interest at 6% for an alleged back pay period of April 1, 1971 to February 27, 1979; and (ii) for Barnhart $34,121.47 plus interest at 6% for Barnhart for the same alleged back pay period. Nichols answered on June 25, 1979. The Regional Director filed an amendment to the back pay specifications on October 5, 1979, the principal purpose of which was to remove the February 27, 1979 limit on back pay for Barnhart. The Board asserted that, as to her back pay "continues unabated to the present because no proper offer of reinstatement has been made to her." The back pay hearing was rescheduled for November 8, 1979.

On October 17, 1979, Nichols served and filed a combined answer to the back pay specification and to the amendment thereto.

Consolidation of the Proceedings

On October 15, 1979—less than three weeks before the back pay hearing, more than four months after Barnhart filed her new charge, and over two months since the NLRB investigated the matter and took statements from management—the Regional Director issued an order consolidating the new unfair labor practice proceeding with the pending back pay proceedings for "purposes of hearing, ruling and decision. . . ." In this same document, the Board set forth for the first time, the above mentioned complaint allegedly based on Barnhart's June 12, 1979 charge, and, simultaneously, scheduled a hearing on the complaint for November 5, 1979—the date then set for the back pay hearing.

Petitioner moved to sever the proceedings and requested an order *inter alia* directing that no hearing be held in Case 8-CA-12909 until it is severed from the back pay proceeding, and that the hearing and decision in Case 8-CA-12909 be conducted and rendered separate and apart from the hearing in the back pay proceeding. As set forth in the motion to sever, and

as hereinafter shown, Nichols was severely prejudiced by such consolidation. The motion to sever was denied by the ALJ at the start of the hearings.

By letter dated November 15, 1979 petitioner requested General Counsel's approval for the service upon the Regional Director of the Board's Region 8 of *subpoenas ad testificandum* and *duces tecum*, to be returnable at the hearing. By telegram dated November 27, 1979 the request was denied. Petitioner has persisted in its objection to this ruling and the procedure pursuant to which it was issued, all of which denied it the opportunity to obtain documentary evidence and testimony relevant to the issues raised by the defenses in the back pay and unfair labor practice proceedings and further denied petitioner its Constitutional due process right to a fair hearing.

The Board's Decision and the Court of Appeals Affirmance

Without critically or analytically addressing any aspect of the ALJ's decision the Board broad brushed the matter, rubber stamped that decision and stated merely that it "has decided to affirm the rulings, findings and conclusions of the Administrative Law Judge . . ." App. 9a). The Court of Appeals in deciding to enforce the Board's order did not fairly search the record because such search could not yield the conclusion that . . . "The administrative record offers ample support for the findings of fact and credibility determinations which underlie the conclusion that Nichols 'constructively' discharged Barnhart in March of 1979."

Reasons for Granting the Writ

A. The decision of the Court of Appeals fails to follow this Court's directive contained in Universal Camera Corporation v. NLRB.

The Board and the Court below did not view the record of the hearing as a whole and did not take into account considerable evidence including Barnhart's own testimony that fairly

detracted from and fully contradicted the Board's evidence and the ALJ's findings.

This Court (Mr. Justice Frankfurter) in *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474 (1951), in pertinent part wrote as follows:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment. (at 487-488)
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> . . . .
>
> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts

> of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matter within its special competence or both (340 U.S. 490).

The Sixth Circuit cited *Universal Camera*, 340 U.S. at 493, for the proposition that "the Court may not substitute its judgment for that of the Board even if it might have reached different conclusions in a hearing *de novo*." We respectfully submit that p. 493 of 340 U.S. does not contain support for that proposition. Indeed, at 340 U.S. 488-489, Mr. Justice Frankfurter wrote as follows:

> To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

As demonstrated hereinafter, by a summary of the salient facts contained in the administrative record, the Sixth Circuit in affirm-

ing the Board grossly misapplied or misapprehended the substantial evidence standard of review. That standard as enunciated by this Court in *Universal Camera* prohibits a Court of Appeals from affirming a decision of the NLRB without examining the entire administrative record including all evidence contrary to the Board's position or evidence from which inferences could be drawn conflicting with the Board's findings. The Sixth Circuit and the Board in the present case ignored the significant evidence introduced by the employer which was diametrically opposed to the Board's proof and contentions. Thus, the Court of Appeals should have reviewed the record in its entirety including the evidence opposed to the Board's view, to determine whether substantial evidence supports the Board's decision. In the case at bar the ALJ, the Board and the Court below totally ignored persuasive evidence opposed to the Board's view.

As shown hereinafter, another Circuit has applied the *Universal Camera* standard of review in accordance with its clear terms and searched the entire record, including the employer's testimony that the ALJ either ignored, failed to credit or misconstrued. It is appropriate for this Court, on the present record, to grant this petition and reaffirm the precept of *Universal Camera*. As stated in *Universal Camera* where the substantial evidence standard of review "appears to have been misapprehended or grossly misapplied," this Court will intervene. This is just such a case.

Significantly, the Court of Appeals at the outset of its decision makes two crucial findings that demonstrate both the failure below to view the record as a whole and the prejudice from which petitioner suffered throughout the prior proceedings. The Court of Appeals found that upon her reinstatement in February 1979 Barnhart "was instructed to 'float' between departments on an 'as needed' basis and that on March 19, 1979 Barnhart received conflicting job assignments from different supervisors." The Sixth Circuit then proceeded to tie the knot by contending—without record support—that the alleged conflicting assignments "cul-

minated in a confrontation with the store manager, who reprimanded Barnhart publicly and in the presence of other Nichols' personnel. Barnhart clocked out and did not return to work. An unfair labor practice charge alleging 'constructive discharge' was filed on her behalf" (App. 3a). It is inconceivable that a fair reading of the entire record could produce these conclusions.

A constructive discharge occurs when "an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job," *Muller* v. *U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Young* v. *Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975); *Montgomery Ward & Co.* v. *NLRB*, 377 F.2d 452 (6th Cir. 1967). If the Sixth Circuit had followed *Universal Camera* and reviewed the entire record as a whole, it could not have found that Barnhart was constructively discharged.

Barnhart's 1979 Reinstatement and Quit

When Barnhart was reemployed on February 27, 1979, the store manager told her that he wanted to start out anew and to forget the past; that he had an open door policy and that if she had any problems or questions, she should feel free to come to him; he explained that he considered the past to be water under the bridge, that he was going to let bygones be bygones and get a new start. He stated that all he expected was a fair day's work for a fair day's pay.*[2]

Barnhart was assigned a job as a clerk in the lamp department. Though the ALJ employed every artifice to make it seem otherwise—(and his decision and approach has been rubber stamped to this point)—a truly objective view of the facts demonstrates beyond a doubt that this assignment was the substantial equiva-

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[2]*The manager held this discussion because of the prior unfair labor practice proceedings and Nichols desired to avoid a repetition of such proceedings.

lent of her former position. When the store was busy she would be asked to help out at the front registers. Barnhart admitted there were three or four other girls among a night crew of twenty to twenty-four employees who were moved to the front registers when needed. Barnhart testified that when she previously worked in the store, it was policy for an employee to help out in other departments and that she did so. It was a distortion of the record for the Court of Appeals to describe Barnhart's assignment as a "floater." She was treated the same as other clerks and would have been treated no differently if she had never left Nichols employ. The charge that she filed did not contain any assertion concerning her job assignment.

An unbiased view of the record as a whole belies the foregoing findings of the Court of Appeals. As briefly described hereinafter the overwhelming evidence contradicts the description of Barnhart's job as one of a "floater." Furthermore, Barnhart described herself as fully satisfied with the work she had been assigned and her quit was unrelated to any alleged conflicting assignment.

In the charge she filed Barnhart only alleged that on or about March 19, 1979 she was constructively discharged because of her union membership and activities and because she gave testimony in prior unfair labor practice cases.* As noted above, the complaint which was issued on October 15, 1979, in addition to alleging a constructive discharge, alleged, for the first time, that on February 27, 1979 Nichols had refused to properly reinstate Barnhart. The complaint failed to state in what respect the reinstatement was improper. During the hearing it became crystal clear why no such detail could have been pleaded. There were no facts to support the *pro forma* allegation of improper reinstatement; Barnhart had not complained about the wages, hours or clerks position to which she had been reinstated. Furthermore, the record demonstrates and the ALJ agreed that all employees, other than managers, were essentially clerks performing the same duties (App. 24a).

*See footnote 1 *supra*.

Barnhart had no problems working in the lamp department and testified that she was not unhappy with anything she was asked to do and that she was pleased. She was assigned duties by the lamp department head, Francis Kee ("Kee"). Barnhart further testified that not only was she satisfied with the work but that up to March 12th she was satisfied with everything that happened in the store.

On the latter date Barnhart was asked by assistant manager Dill to help put the housewares department in shape, because it had become disorganized. The record evidence—without contradiction—established that it was common practice and policy to temporarily shift employees from one department to another to help straighten up or shelve merchandise. Since the store had about 20 to 24 employees at night compared to approximately 50 during the day, the manager could not have one employee in every department at night; therefore, employees were asked to help out wherever they were needed. Even office employees were used to help straighten out a department or shelve merchandise. Hedy Fondriest, a night employee in the office, testified to the numerous times she had been used in almost every department to give assistance where needed.*[3] There was therefore nothing unusual about using Barnhart to help straighten out the housewares department.

Accordingly, despite the ALJ's pointed failure to face the record facts and his evasive attempt to portray as "unique" Barnhart's brief transfer to the housewares department, it is clear that such temporary transfers were commonplace and the procedure was well known to the employees. Any available employee would have been given that assignment. Approximately two weeks before, four or five other night people helped out in that department.

Barnhart specifically testified that she didn't mind going to straighten out housewares because "it was a challenge." She

[3]*Significantly, the decision of the Administrative Law Judge totally ignored the testimony of fellow employee Fondriest and ignored as well other conclusive evidence that supports petitioner's position.

wasn't assigned to housewares for any particular period, just as long as it took to help get it in shape. When she previously worked for Nichols she had been a clerk, not permanently assigned to a register. When reinstated in 1979 she was given the same job and was subject to the same work conditions, which included helping out in other departments. She therefore had no cause for complaint and did not complain about her assignment.

On this subject, the Court below in disregard of Barnhart's own testimony and without record support attempted to equate Barnhart's 1979 reemployment to the "scrub" duty which she had been asked to do upon her prior reinstatement. This treatment by the Sixth Circuit and the Board was totally unfounded and demonstrates the prejudice that petitioner has suffered from the consolidation of the proceedings and from the Board and the ALJ desperately misconstruing and misdescribing the facts in order to vitiate petitioner's good faith effort to reinstate this employee in February 1979. The record simply does not support any contention that Barnhart's 1979 duties were "onerous" or "unpleasant" or that she quit for that reason.

The record does not support the ALJ's finding that Nichols made no effort to restore Barnhart to her former position as clerk of the men's wear department and made no explanation for not doing so (App. 34a). The record evidence and case law precedent overwhelmingly contradicts the ALJ's premise that only reinstatement to the men's wear department was permissible. An employer is not required to reinstate an employee to a job requiring the performance of exactly the same duties previously performed. *NLRB* v. *Skinner Kennedy*, 113 F.2d 667, 671 (8th Cir. 1940); *Barkers East Main Corporation*, 136 NLRB 494, (1962) CCH NLRB ¶11,056; Barnhart was reinstated in good faith to virtually the identical position she formerly held. She was asked to help out in another department only because of valid business reasons applicable to all sales clerks at the time. In no way was Barnhart singled out for different treatment than she would have received if she had been continuously employed.

The Facts Relating to the Constructive Discharge Claim

The Board and the Court below uncritically rubber stamped the ALJ's finding that Petitioner's conduct from February 27 to March 19, 1979, culminating in the events of March 19, constituted a constructive discharge of Barnhart. The Board and the Court below refused to look at the record as a whole, ignored the testimony of Barnhart's fellow employees and other witnesses, just as the ALJ had ignored such testimony, and adopted every misinterpretation or erroneous assumption made by the ALJ. The record facts which were totally ignored below concerning Barnhart's quit belie any constructive discharge claims. The simple facts leading to her walking off the job are as follows:

While Barnhart was helping reorganize the housewares department, a large shipment of merchandise was received which required additional people to check and shelve goods. People on the day shift were sent to help out, including Paula Powers. Barnhart told Powers to "stock it" herself with respect to the merchandise which Powers had checked in and which she asked Barnhart to help put on the shelves. Barnhart's conduct towards Powers was a rude, unreasonable response to a nonprovocative situation. Here again the ALJ totally misconstrued the evidence (App. 30a). Robert Hathorn, then an assistant manager, testified that Barnhart's response to Powers was inappropriate. In any event, based upon her one conversation with fellow employee Powers, Barnhart asked Hathorn about conspiracies against her and complained about being bossed around. She later told Hathorn that "nobody is telling me what to do."[4]

Barnhart's impudent statement to an assistant manager, that nobody can tell her what to do, and her lack of cooperation with a fellow employee, make it clear that Barnhart was attempting to provoke an incident and that she had a "chip on her shoul-

[4]"There is no basis whatever for ignoring Barnhart's provocative conduct in this regard. In any event, when she quit some days later, she made no mention of this; her quitting was prompted solely by her March 19th conversation with the store manager about lateness and gum chewing.

der." The events of March 15th do not represent a problem between Barnhart and management since her dispute was with Powers, a fellow employee who was not a part of management.

On Friday, March 16th, Barnhart was off; on March 17th she worked in housewares and on Sunday March 18th she worked at a register all day because the head cashier was sick. It is clear that there were no problems between Barnhart and management on those days.

On March 19, 1979, Kee (head of the lamp department), after obtaining the store manager's approval, told Barnhart she was to return to the lamp department. The ALJ—having completely ignored the record evidence detrimental to Barnhart found "it hard to believe" Kee's testimony (App. 31a). Petitioner finds it hard to believe how the ALJ could view the record with blinders—seeing only what he chose to see and create a credibility issue where none existed. The record is clear that Barnhart had been assigned to the lamp department and that Kee, head of the department, regularly gave Barnhart instructions. There had been no difficulty between them; once again the prejudice of the ALJ shows through.

Contrary to Barnhart's assertion—raised for the first time at the hearing—she had not been promised permanent assignment to housewares. Assistant manager Dill did not ask Barnhart to remain in housewares on a permanent basis. The belated assertion of a promised permanent assignment to housewares is incredible in view of the uncontrovertible testimony that there had been no permanent night person in housewares for several years and in view of the fact that this assertion was not raised in any manner until the hearing.

Here again with no basis in the record, the ALJ sought to make this a credibility issue and "credit[s] Barnhart's account that she was promised the housewares job" (App. 31a). This finding is incomprehensible, contrary to the overwhelming weight of the evidence and must be rejected for the simple reason—if for

no other—that Barnhart knew Dill could not give her a job without the store manager's approval. The ALJ in seeking a foundation for his finding of constructive discharge sought to create a factual pretext to convert Barnhart's eventual walk-out into an improper discharge. When she walked off the job, she did not quit because of her job assignment.

On March 19th, after Barnhart returned to work in the lamp department and had finished what she had been asked to do, she asked assistant manager Caravati for more work. He asked her to go with him to the stockroom and put lamps in numerical order so that they could be easily obtained from inventory. On their way they were met by store manager Ricer. He had been advised by the payroll clerk that Barnhart had taken breaks in excess of the established 10 minute period.

When Ricer met Barnhart and Caravati, he simply advised Barnhart that she had been taking too long on her breaks and that she was to take only ten minute breaks. He noticed that she was chewing gum, in violation of store policy and told her to take the gum out of her mouth. Barnhart responded by saying "yes sir," and walked back toward the lamp department. About 25 minutes later Barnhart left her work, suddenly came to the office window after punching out, and advised Ricer that she was going home. He asked her if she was sick; Barnhart said she didn't like to be spoken to like a dog. Ricer reminded her that all he had done was to mention that she should take ten minute breaks and not chew gum on the sales floor. Barnhart said she was going home, Ricer said good night and Barnhart responded by saying it was not good night but good-bye and that her lawyer would be in touch. This conversation was overheard clearly by assistant managers Caravati and Hathorn and by employee Fondriest.*[5] Barnhart then left the store.

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[5]*The Administrative Law Judge completely ignored Ms. Fondreist's testimony.

Barnhart's quitting did not relate to her reinstatement or job assignment; her quit was prompted by her reaction to Ricer's telling her to take ten minute breaks and not chew gum on the sales floor. There is no question from the time cards that Barnhart had taken breaks in excess of ten minutes, nor did Barnhart dispute this. When Ricer spoke to her there was no doubt in her mind that she had taken such breaks. The testimony showed that other employees had been disciplined and even fired for continued infractions of break, lunch or reporting time requirements. The ALJ, the Board and the Court below ignored this evidence and testimony of other employees that Ricer, as a common practice, talked to employees on the floor about chewing gum and about lateness. (Employees, Kee and Fondreist, testified that they had been spoken to by Ricer on numerous occasions about gum chewing.)

Furthermore, the ALJ's description of Ricer's conversation with Barnhart concerning "two matters of personal conduct" is an invention of the ALJ (App. 35a). It must be emphasized that Barnhart was not given a warning; no adverse consequences or disciplinary action were threatened as a result of her time infractions. She was simply reminded of the store rules concerning breaks and gum chewing and asked to adhere to them. That certainly does not constitute cause for a quit. Simply talking to her about this in front of another supervisor was not contrary to policy. Other employees were not present; there was no need to hold such brief, informal discussion in the office. Nor is it relevant that Ricer "had not previously mentioned" these matters to Barnhart.*[6] Ricer had not publicly reprimanded Barnhart for taking a 20 minute break as the ALJ would make it appear (App. 35-36a) but only spoke to her in the presence of an assistant manager. Barnhart maneuvered herself into a position to claim constructive discharge and simply chose to walk out because she really

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[6]*Again, the ALJ's mention of Ricer's concession on cross-examination that he never disciplined employees for those infractions is a non-sequitur since Ricer was not disciplining Barnhart. The ALJ's entire approach here reveals the depth of his bias against respondent.

didn't want to work.*[7] Barnhart's history of inability to obtain employment during the prior eight years, casts some doubt on her desire to work.

The ALJ's version of the events of March 19, is pure fiction—barren of record support. When viewed against the entire record, the Board's and the Court of Appeals' rubber stamping of these unsupported findings—without evaluation of the contrary evidence or of the evidence from which conflicting inferences could be drawn—is sufficient to warrant review by this Court. Thus, the following incorrect findings of the ALJ, among others, without record support or contrary to the record evidence, have been perpetuated:

(a) In the third week of her employment changes began with the assignment of Barnhart to a heavy clean-up job . . . (App. 34a).

(b) On March 17, 1979 Assistant Manager Dill offered, and Barnhart accepted, a regular asignment as clerk of the housewares department (App. 35a).

(c) Manager Ricer "yanked" Barnhart back to the lamps department for additional clean up work (App. 35a).

(d) He did this "in the humiliating fashion of having a fellow employee rather than a supervisor give these instructions to Barnhart . . . in effect letting Barnhart know that she was just a utility girl assisting other employees" (App. 35a).

The ALJ misconstrued and misdescribed the evidence, in order to justify the conclusion he sought to reach. The Board and the Court below have perpetuated these improper findings by failing to view the entire record and by ignoring among other facts evidence contrary to the Board's view including the evidence that store personnel went out of their way to try and avoid problems with her. When Barnhart advised assistant manager Hathorn

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[7]*A constructive discharge occurs where an employer makes an employee's conditions of employment intolerable. *Fashion Fair, Inc.*, 163 NLRB No. 22, 1967 CCH NLRB ¶21,129 (1967). See p. 10 *supra*.

on March 15th that nobody could tell her what to do, Hathorn could have sent Barnhart home for insubordination—instead, he just walked away. Employee Fondriest testified that "everybody treated her [Barnhart] really nice."

In view of all the foregoing, it is quite apparent that Barnhart purposefully walked off the job on March 19th without any justification whatsoever. From her own statement at the time, her quit related solely to the tone in which she perceived the store manager to have spoken to her earlier that evening. Respondent did not constructively discharge Barnhart. Her working conditions were by no means made uncomfortable or intolerable. She was treated the same as other employees in every respect. Barnhart could not and did not complain that her transfer to housewares and return to the lamp department constituted a constructive discharge, since others were given the same assignment and it was done pursuant to a justifiable, reasonable management need and policy.** A true review of the full record facts will demonstrate that Barnhart was properly reinstated on February 27, 1979 and that she was not thereafter constructively discharged.

Standard Of Review

In reviewing the ALJ's decision, the Board may accept the ALJ's findings only when they are supported by substantial evidence based on the *record as a whole. Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951); *NLRB* v. *Tennessee Packers Inc., Frosty Morn Division*, 339 F.2d 203, 204 (6th Cir. 1964). The record as a whole includes the body of evidence presented by the employer. *Universal Camera Corp.* v. *NLRB*, *supra*, 340 U.S. at 488. At bar, the Board refused to objectively consider the substantial evidence presented by Nichols and the

**When such moves are the result of justifiable business reasons, they do not provide the basis for an alleged constructive discharge. *NLRB* v. *Brennan's, Inc.*, 366 F.2d 560 (5th Cir.), *modified on other grounds*, 368 F.2d 1004 (5th Cir. 1966).

uncontroverted testimony—including that of Barnhart herself—which clearly demonstrated that she was reinstated to substantially the same position she formerly held. Thus, the Board failed to apply the proper standard of review and its findings should have been set aside.

The Court of Appeals was not bound to accept the Board's findings where as here the Board totally ignored the compelling evidence presented by respondent below:

> [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed* to the *Board's view*. (Emphasis added).

Universal Camera Corp. v. *NLRB, supra,* 340 U.S. 488.

The Board refused to look at the whole record in adopting the ALJ's finding that Nichols constructively discharged Barnhart, Now the Court below, without examination, has accepted each and every unsupported assumption of the ALJ on this subject, and ignored the evidence which clearly demonstrated that Barnhart walked out of the store on March 19, 1979, without any justification whatsoever, simply because of her alleged perception of the tone in which the manager had spoken to her.

The ALJ's decision and the Board's decision rely primarily upon a rehash—incorrect in many key aspects—of the prior disputes between the parties relating to past efforts to reinstate Barnhart and Moore. This approach followed by the Board from the inception of Barnhart's 1979 unfair labor practice charge made it impossible for petitioner to fulfill its intention to let bygones be bygones and restore Barnhart to a clerk's position virtually identical to the one she formerly held.

In a similar case, the Court of Appeals for the Seventh Circuit reviewed the entire record and applied the substantial evidence test of *Universal Camera, supra,* in a manner clearly different from the procedure employed by the Sixth Circuit here below. (See, *Portable Electric Tools, Inc.* v. *N.L.R.B.*, 309 F.2d 423 (1962).

In *Portable Electric* a review of the entire record including the evidence unfavorable to the Board led the Court of Appeals to find that the Trial Examiner's analysis of the evidence was "labored" and did "not warrant a finding that the real reason" for the discharge in that case was "union activity absent independent evidence that such activity existed and that the company knew of it" 309 F.2d 426.

The Trial Examiner in *Portable* as did the ALJ at bar relied exclusively upon the testimony of the charging party and ignored the contrary evidence introduced by the employer. The Seventh Circuit, however, searched the entire record and reversed the Board's order. In so doing, the Seventh Circuit significantly described its appellate function as follows:

> If this Court, however, is not to be 'merely the judicial echo of the Board's conclusion' then its determination must "be set aside when the record * * * clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. * * * The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 71 S.Ct. 446, 95 L.Ed. 456. While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be given when evaluating the evidence on the record as a whole.

At bar—the ALJ, the Board and the Court of Appeals have

ignored petitioner's evidence, created issues of credibility where none exist and engaged in unsupported supposition, all aimed at shifting to petitioner the burden of proof as to the issues of constructive discharge and reinstatement.

B. The Court below incorrectly decided an important issue concerning the duty of an employer to mitigate under Section 10(c) of the National Labor Relations Act which has not been, but should be, settled by this Court.

This case presents an important issue of federal labor law involving one of the fundamental purposes of the National Labor Relations Act ("NLRA"). To further the NLRA's policies of promoting peaceful resolution of labor disputes and full employment, an employee, even one discharged for union activity, has the duty to make a reasonably diligent search for interim employment during the back pay period. The Sixth Circuit's decision is in direct conflict with both this clear policy of the NLRA's and the case law interpreting Section 10(c) of the NLRA. It is necessary for this Court to grant this petition for certiorari to vindicate the policy of the NLRA and settle a conflict in the case law concerning an employee's duty to mitigate under Section 10(c).

This Court, in order to further the "healthy policy of promoting production and employment" underlying the NLRA, has held that back pay awards must be reduced by any "willful loss of earnings." *Phelps Dodge Corp.* v. *NLRB.*, 313 U.S. 177, 197-198, 200 (1941). *See NLRB* v. *Seven-Up Co.*, 344 U.S. 344, 346 (1953); *NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F.2d 1014, 1017 (9th Cir. 1979).

Recognizing this policy, the courts have required a discharged employee to make a reasonable effort to find new employment, substantially equivalent to the position formerly held, and which is suitable to the employee's background and experience. *See NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F.2d 1014, 1018-19 (9th Cir. 1979); *NLRB* v. *Southern Silk Mills, Inc.*, 242

F.2d 697, 700 (6th Cir. 1957); *cert. denied,* 355 U.S. 821 (957); *McCann Steel Co.* v. *NLRB,* 570 F.2d 652, 655 (6th Cir. 1978).

This Court's review of the decision below is sought to delineate the scope of the "reasonable effort" standard. Petitioner submits that even a cursory review of the factual findings of the ALJ, which findings were adopted by the NLRB and the Sixth Circuit, reveals that Barnhart's efforts to seek new employment do not even approach the "reasonable efforts" standard. The effect of the decision below will be to encourage idleness on the part of discharged employees and thereby undermine the purpose of the NLRA.

In reaching the conclusion that Barnhart used reasonable efforts to find interim employment the ALJ reasoned:

> In evaluating Barnhart's efforts to obtain interim employment, while Respondent looked at and counted only the number of days Barnhart sought employment, General Counsel looked, rightly I believe, at the actual visits to and inquiries of individual employers (because in a day's trip Barnhart usually called upon several potential employers in common locations or close to each other), the repeat visits, and the visits to the state employment service. Thus General Counsel calculated that in the approximate eight years' back pay period dealt with at trial, from April 1971 to November 1979 (which excluded the six month interim employment with Quik Shops in 1974 and the 21-week withdrawal from the employment market in 1976), *Barnhart made about 500 tries at obtaining employment in an approximate 400 week period.* Scrutinizing the entire back pay period . . . it appears that Barnhart averaged better than one job inquiry per week in the entire eight year period. Her reapplications over the months and years to places that had not accepted her previously did not detract from the reasonableness of her effort . . . . (App. 54a) (emphasis added).

Petitioner submits that it was incorrect, as a matter of law, to solely premise this decision on Barnhart's purported "tries" at obtaining interim employment because her "tries" were not indicative of a realistic, reasonable effort to obtain new employment. For example, the record contains overwhelmingly undisputed testimony and evidence that: (1) She frequently failed to follow up by visit or telephone places where she claims to have left a job application or where she otherwise claims to have sought employment; (2) She would go to places looking for work without any indication of whether or not there might be a job available; and (3) She would visit employers based upon the fact that they were close to her home or close to each other. For example, if she went to a shopping center, she would visit several stores in the center—without any reason to believe that a job was available.

A more telling indication of Barnhart's haphazard search for work is the undisputed number of days on which she attempted to obtain employment. Indeed, according to her own diaries, she looked for work only 33 days in 1971, 29 days in 1972, 20 days in 1973, 7 days in 1974, 16 days in 1975, 14 days in 1976, 12 days in 1977, 13 days in 1978 and 6 days in 1979. In other words, from 1971 to 1974 Barnhart searched for employment on approximately less than 10% of the business days in each year and from 1974 to 1979 searched for employment on approximately one day per month. It is necessary for this Court to grant this petition in order to establish that, as a matter of law, in the light of the policy behind the NLRA, such negligible search cannot constitute "reasonable efforts."

Indeed, analogous decisions of both the NLRB and the Ninth Circuit have so held. In *Flite Chief Inc.*, 246 NLRB No. 55 (1979), *enforced in pertinent part*, 640 F.2d 989 (9th Cir. 1981), the Board affirmed as modified a decision specifically holding that looking for a job once a month does not meet the duty of using reasonable efforts. There, in a decision diametrically opposed to the one at bar, the administrative law judge specifically held that:

> Ford made attempts at securing employment an average of *only once a month during each of the 49 months which comprise the back pay period.* Ford offered no excuse or explanation for her obvious lack of effort to secure an interim part-time job to replace the one she had lost when Respondents discharged her. I do not believe that it is reasonable to conclude that so few attempts at securing interim employment constitutes "reasonable diligence."

Furthermore, in *NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F.2d 1014 (9th Cir. 1979), the Ninth Circuit explicitly held that an employee's attempt at securing employment "an average of only three times a month during each of the nine months that he was in the job market after his discharge" did not constitute "reasonable diligence." *Id.* at 1018. In conflict with the Sixth Circuit, the Ninth Circuit correctly recognized the policy of the Act:

> A worker who has been the victim of an unfair labor practice is not entitled to simply await reimbursement from his or her employer for wages lost, for "the statute was not intended to encourage idleness." . . . To hold otherwise would undermine the "healthy policy" underlying the Act, "promoting production and employment."

Id. at 1017-18. (Footnote and citations omitted).

Thus, this Court's review is necessary to settle this uncertainty in the case law concerning an employee's duty to mitigate under Section 10(c). In addition, this Court should not permit a discharged employee to remain idle during most of a lengthy back pay period with the expectation that she will be able to receive compensation from petitioner in any event. Barnhart was successful in obtaining *only one* interim employment during an eight-year back pay period; a job Barnhart unjustifiably quit after working only six months (App. 49a, 56a).

Moreover, the ALJ found that Barnhart fulfilled her legal duty

of searching for interim employment notwithstanding that she ignored such obvious methods of seeking employment as the newspaper ads and private employment agencies (App. 50a). The ALJ found that throughout the eight-year back pay period Barnhart only applied for one job through the newspaper. Petitioner introduced into evidence at the administrative hearing the local newspaper ads on the days that Barnhart claimed she was looking for work and undisputably they contained numerous suitable employment opportunities.

In addition, the administrative law judge acknowledged in his decision that Barnhart refused to use a local employment agency (App. 50a). Petitioner introduced the head of a local employment agency as a witness at the administrative hearing who testified that there were numerous jobs available for a semi-skilled worker such as Barnhart and that it was his experience that after four to six interviews a person could obtain suitable employment.

Finally, although it is undisputed that Barnhart registered with the state employment agency, the ALJ found that Barnhart did not, throughout the entire eight-year back pay period, apply for a single job through that agency (App. 46a).

This Court should grant certiorari for another important reason. The Sixth Circuit's decision has broad ramifications. The duty to mitigate under Title VII of the Civil Rights Acts of 1964 was "expressly modeled on the back pay provisions of the NLRA. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 409, 419 & n.11 (1975). Thus, the case law concerning mitigation under the Act generally guides the courts in establishing the duty to mitigate under Title VII. *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 102 S.Ct. 3057 (1982). *See e.g., Sangster* v. *United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980). Therefore, the decision at bar that such a negligible effort satisfied an employee's duty to mitigate under Section 10(c) of the NLRA has wide implications in the Title VII area.

The Court is presented with an issue of national importance involving an important purpose and policy of the NLRA. Accordingly, it is essential that this Court announce clear guidelines to the lower courts and to employers and employees establishing the scope of an employee's duty to mitigate by seeking interim employment during a back pay period.

C. The record herein demonstrates that the Court below and the Board avoided addressing the issue of the flagrant denial of petitioner's constitutional right to due process and a fair hearing, which merits the attention of this Court.

The Sixth Circuit, the Board and the ALJ have continuously avoided coming to grips with petitioner's contention that it was denied due process of law and a fair hearing in this matter. As set forth hereinabove (p. 6), prior to the hearing petitioner, in accordance with the Board's rules, requested general counsel's approval for the service upon the regional director of subpoenas returnable at the hearing. That request was denied. Again at the hearing petitioner's counsel sought the issuance of subpoenas directed to Board personnel to introduce evidence concerning admissions against interest by Barnhart in respect of the charge she had filed which initially had been withdrawn. An offer of proof was tendered and appears in the record, to show that Barnhart and the Board believed that the charge lacked merit and that it had been filed to pressure a settlement of the backpay proceeding. The ALJ blocked this evidence at every turn.

It is well-settled that

> [A] refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process. . . . That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point . . . a controversy tried before a court or before an administrative agency is not ripe for decision

> until all competent and material evidence proffered by the parties has been received and considered.

Donnelly Garment Co. v. *NLRB*, 123 F.2d 215, 224 (8th Cir. 1941) (citations omitted); on remand, 50 NLRB 241; enf. den. 151 F.2d 854 (8th Cir. 1945); *rev'd on other grounds*, 330 U.S. 219 (1947); on remand 165 F.2d 940.

Admissions against interest made by the charging party at the time she withdrew a prior, identical charge must be relevant and admissible. To deny petitioner the right to introduce evidence of such admissions undermined the hearing and the judicial process, and deprived Petitioner of its constitutional right to a fair hearing. *See NLRB* v. *Burns*, 207 F.2d 434 (8th Cir. 1953). Such denial was reversible error requiring rejection of the Board's Application for Enforcement and remand of this proceeding. *NLRB* v. *Burns, supra; Donnelly Garment Co.* v. *NLRB, supra.*

The ALJ refused to permit evidence and testimony on this subject in a manner that showed an intention to insulate the record from clearly relevant and proper testimony. Thus, for example, without any basis whatsoever for such characterization—the ALJ described the proffered evidence as an effort to inquire into the investigative procedures of the General Counsel and into the mechanics of the investigation.*[9] Nothing could be further from the truth; the ALJ had no basis to make this assumption and to exclude evidence that was so clearly proper and relevant. By preventing any questions concerning Barnhart's filing and withdrawal of her first charge, the ALJ prevented Nichols from adducing testimony to support its defenses.

Petitioner sought to subpoena the Regional Director, to testify, as set forth in an offer of proof. The ALJ refused to issue this subpoena. It should have been self-evident from the record that the Regional Director or his representative possessed non-privi-

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[9]*In response, Nichols' counsel stated "I am not proposing to question either the jurisdiction of the Board to proceed, nor am I suggesting that the Board solicited the charge".

leged, relevant evidence. Under the circumstances the refusal to subpoena the Regional Director was a star-chamber tactic; prosecutor and judge acting as one deprived respondent of its right to a fair trial and to due process of law.

Fundamental fairness requires that an employer be allowed to obtain documents and testimony that may impeach or rebut the evidence against it. "The NLRB cannot hide behind a self-erected wall evidence adverse to its interests as a litigant" and the relevant statutes do "not call for a result so inimical to our traditions of fair trial." *NLRB* v. *Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961).

In *Wheeler* v. *NLRB*, 314 F.2d 260 (D.C. Cir. 1963) the employer claimed that it was denied a fair hearing because the Trial Examiner excluded proffered evidence, denied cross-examination of certain adverse witnesses and excluded rebuttal evidence which was tendered by the employer. The court held that the employer was deprived of a fair trial and vacated the Board's order and remanded the proceedings:

> We find it difficult to understand how the Board could dissociate the Examiner's findings and recommendations from the evidence of bargaining history which loomed so large to the Examiner. The refusal to allow the employer to cross-examine on the subject and to present his version of that subject led to a record weighted unfairly against one party. This constituted a denial of due process which can be remedied only by a remand to supplement the record and as supplemented it must be reexamined by the Board.

Id. at 263.

As in *Wheeler*, the ALJ at bar refused to allow petitioner to cross-examine adverse witnesses in violation of petitioner's due process rights.

It is axiomatic that if the order of the Board is found to be

> premised upon an unfair hearing then such order must be set aside and the case remanded to the Board for a new hearing. A. O. Smith Corporation v. N. L. R. B., 7 Cir., 343 F.2d 103, 110 (1965); Tele-Trip Company, Inc. v. N. L. R. B., 4 Cir. 340 F.2d 575, 581 (1965); National Labor Relations Board v. Bryan Mfg. Company, 7 Cir. 196 F.2d 477, 478 (1952). The due process requirement of a fair hearing is unwavering even though the findings of an unfair hearing might otherwise be justified on the merits. National Labor Relations Board v. Phelps, 5 Cir. 136 F.2d 562, 563-564 (1943).
>
> *Great Lakes Screw Corporation* v. *NLRB*, 409 F.2d 375, 381-382 (7th Cir. 1969).

The failure of the Sixth Circuit to even address this crucial constitutional due process, fair hearing issue is further confirmation of the petitioner's contention that the entire record was not reviewed below and that a writ of certiorari should issue herein.

CONCLUSION

For each of the foregoing reasons, petitioner requests that this petition for a writ of certiorari be granted.

Dated: New York, New York
July 14, 1983

Respectfully submitted,

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No.

U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

S. E. NICHOLS OF OHIO, INC.,

Petitioner,

—VS.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Opinion of the United States Court of Appeals, Sixth Circuit [704 F.2d 921 (1983)]

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

S. E. NICHOLS OF OHIO, INC.,

Respondent.

No. 81-1756.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 22, 1983.

Decided April 15, 1983.

The National Labor Relations Board filed petition seeking enforcement of orders directing employer to reinstate a former employee and granted back pay awards to that employee and another former employee. The Court of Appeals held that: (1) substantial evidence in record as a whole supported finding that employee was constructively discharged after her last reinstatement, and (2) use of "representative employees" method, which averaged the wages of five employees who were earning the same wages as plaintiffs at time of their unlawful discharges in order to determine "gross" back pay awards which were reduced by certain deductions established by employer, was a reasonable approach to calculation of back pay awards.

Enforcement granted.

Elliott Moore, Deputy Associate Gen. Counsel (argued), Frances O'Connell, N.L.R.B., Washington, D.C., for petitioner.

Leonard W. Wagman (argued), Robert S. Goodman, Golenbock & Barell, New York City, for respondent.

Opinion of the United States Court of Appeals,
[704 F.2d 921 (1983)]

Before KEITH, MARTIN, and JONES Circuit Judges.

PER CURIAM.

The National Labor Relations Board seeks enforcement of orders entered against S.E. Nichols of Ohio, Inc. on September 18, 1981. The Board's orders directed Nichols to reinstate former employee Lena Barnhardt and granted back pay awards to Barnhardt and Carolyn Moore, another former Nichols employee.

The present dispute is twelve years old and has been before this court on two previous occasions. A brief history of the conflict serves to clarify the immediate problem.

In 1970, Nichols, a self-service discount Department store, employed Barnhardt and Moore as clerks. Barnhardt was assigned to the mens' wear department, Moore to the ladies' wear department. In 1971, Barnhardt and Moore emerged as leaders in a union organizing campaign among Nichols employees. Both were discharged on April 1, 1971. In a decision issued March 17, 1972, the Board ruled that the discharges violated section 8(a)(3) and (1) of the National Labor Relations Act, and ordered Nichols to reinstate both Barnhardt and Moore. 195 N.L.R.B. 939. A panel of this court granted enforcement of the Board's order. *NLRB* v. *S.E. Nichols of Ohio, Inc.*, 472 F.2d 1228 (6th Cir. 1972).

In 1973, Nichols "reinstated" Barnhardt and Moore by assigning them to "scrub" duty, a menial task neither had been asked to perform during her previous tenure as a clerk. After working briefly as "scrubbers," both Barnhardt and Moore refused to continue under these conditions. In 1975, Nichols again offered both women "reinstatement" on terms manifestly less attractive than their original employment. Again, Barnhardt and Moore declined this "demotion."

Opinion of the United States Court of Appeals,
[704 F.2d 921 (1983)]

In 1978, the Board initiated contempt proceedings against Nichols, alleging failure to comply with the court's 1972 order. Judge Battisti of the Northern District of Ohio was appointed special master and authorized to conduct an evidentiary hearing. On the basis of the special master's report, this court held Nichols in civil contempt. By order dated February 8, 1979, Nichols was directed to purge itself of contempt by offering "immediate and full reinstatement to Lena Barnhardt and Carolyn Moore to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges."

Accordingly, Barnhardt and Moore returned to work at Nichols on February 27, 1979. Neither, however, was reassigned to the position she had held before her unlawful discharge. Barnhardt was instructed to "float" between departments on an "as needed" basis. On March 19, 1979, Barnhardt received conflicting job assignments from different supervisors. This incident culminated in a confrontation with the store manager, who reprimanded Barnhardt publicly and in the presence of other Nichols' personnel. Barnhardt clocked out and did not return to work. An unfair labor practice charge alleging "constructive discharge" was filed on her behalf.

Moore was also shuttled between different departments after her reinstatement. She quit, apparently without incident, in August, 1979. Moore's resignation is not an issue in the present litigation.

In mid-1979, the Board consolidated Barnhardt's complaint of "constructive discharge" with Moore's and Barnhardt's pending actions for back pay. In November, 1979, an administrative law judge conducted a five-day hearing on the matter. In a decision issued April 7, 1981, the administrative law judge found, first,

that Nichols' treatment of Barnhardt during her last "reinstatement" was "designed to cause her to quit" and thus constituted a "constructive discharge." He recommended that the Board order Nichols, once again, to reinstate Barnhardt. Second, he computed back-pay awards for both Barnhardt and Moore. According to the administrative law judge, Barnhardt was entitled to $34,121.47 plus interest for the period between April 1, 1971 and February 27, 1979. Barnhardt's award was open-ended; her back pay would continue to accrue until Nichols offered her bona fide reinstatement. Moore's back pay was fixed at $22,238.17 plus interest, beginning April 1, 1971 and ending February 27, 1979.

Nichols filed voluminous exceptions to the administrative law judge's report.

On September 18, 1981, the Board issued an order adopting most of the administrative law judge's findings and recommendations. These enforcement proceedings followed.

Nichols raises several challenges to the Board's order. Our review of the record, however, persuades us that these objections are without merit.

[1] First, Nichols asserts that Barnhardt was not "constructively discharged" after her February 27, 1979 "reinstatement." Nichols characterizes itself as "an employer who bent over backward to avoid confrontation and to deal fairly with the reinstated employee . . . Nothing Respondent could have done would have forestalled Barnhardt's walk-out." The crux of this issue is, of course, the proper interpretation of the testimony introduced at the administrative hearing.

[2] It is well settled that a reviewing court must uphold the Board's findings of fact as long as those findings are supported

by substantial evidence in the record as a whole. *Universal Camera Co.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *NLRB* v. *Ogle Protective Service, Inc.*, 375 F.2d 497 (6th Cir.), *cert. denied*, 389 U.S. 843, 88 S.Ct. 84, 19 L.Ed.2d 108 (1972). Reasonable findings of fact will be upheld and credibility determinations will be accepted unless they lack a rational basis. *NLRB* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 660, 69 S.Ct. 1283, 1285, 93 L.Ed. 1602 (1944); *NLRB* v. *Mt. Vernon Telephone Co.*, 352 F.2d 977, 979 (6th Cir. 1965). The court may not substitute its judgment for that of the Board even if it might have reached different conclusions in a hearing *de novo*. *Universal Camera Co.*, 340 U.S. at 493, 71 S.Ct. at 467; *NLRB* v. *Tennessee Packers, Inc., Frosty Morn Division*, 339 F.2d 203 (6th Cir. 1964). In the present case, the administrative record offers ample support for the findings of fact and credibility determinations which underlie the conclusion that Nichols "constructively discharged" Barnhardt in March, 1979.

[3] Second, Nichols challenges the Board's method of computing the back-pay awards. It also asserts that the Board failed to offset Moore's award with her entire interim earnings and contends that Barnhardt's award should be reduced because of her alleged failure to conduct a diligent search for other employment.

[4] In challenging the back pay awards, Nichols has again ventured into an area where the Board enjoys wide discretion. *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969). Indeed,

> When the Board, "in the exercise of its informed discretion," makes an order of restoration by way of back pay, the order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

Id. Furthermore, in back pay proceedings, the General Counsel's burden is limited to showing what the employees would have earned had the employer not violated the Act. The employer bears the burden of establishing deductions from gross back pay such as interim earnings or willful failure to seek other employment. *Marlene Industries Corp.* v. *NLRB*, 440 F.2d 673, 674 (6th Cir. 1971).

In the proceedings below, the Board used the "representative employees" method of calculating the back pay awards. Pursuant to this method, the Regional Director selected five Nichols sales clerks who were earning the same wages as Barnhardt and Moore at the time of the unlawful discharges. The earnings of these representative employees during the relevant period were totaled, by quarters, and the totals divided by five. The quarterly "average" wages, thus obtained were added together to yield the "gross" back pay awards. Finally, the gross awards were reduced by certain deductions established by Nichols, notably Barnhardt and Moore's interim earnings.

We believe that the "representative employees" method was, in this instance, a reasonable approach to the calculation of back pay awards. *NLRB* v. *Int. Assn. of Bridge, S. & R.I. Workers, Local 378*, 532 F.2d 1241, 1242 n. 3 (9th Cir. 1976); *Midwest Hangar Co.*, 221 N.L.R.B. 911, 915 (1975), *enforced NLRB* v. *Midwest Hangar Co.*, 550 F.2d 1101 (8th Cir. 1977). *See also NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963).

[5] We also find that Nichols' objections to the net back pay awards are without merit. First, in calculating Moore's award, the Board took account of the fact that Moore had consistently worked two jobs while she was originally employed at Nichols. Accordingly, in deducting interim earnings from Moore's gross award, the Board considered only those wages which were, in

effect, substitutes for her wages at Nichols. The Board did not deduct "second job" earnings from Moore's gross award. Nichols' arguments to the contrary notwithstanding, we find this result eminently fair and reasonable.

Second, we decline to reverse the Board's holding that Barnhardt made diligent efforts to obtain other employment. This question, of course, turns on interpretation of the evidence presented at the hearing and thus lies within the purview of the Board's discretion. *Marlene Industries*, 440 F.2d at 674; *Golay & Co.* v. *NLRB*, 447 F.2d 290, 295 (7th Cir. 1971). We decline to substitute our judgment on this question for that of the Board.

Enforcement granted.

Supplemental Decision and Order of the National Labor Relations Board [258 NLRB No. 2 (1981)]

FJZ

258 NLRB No. 2

D—7989
New Philadelphia, OH

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

S. E. NICHOLS OF OHIO, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 698, AFL—CIO

Cases 8—CA—6414,
8—CA—7858, and
8—CA—9160

and

LENA BARNHART, an Individual

Case 8—CA—12909

Supplemental Decision and Order

On April 7, 1981, Administrative Law Judge Herzel H. E. Plaine issued the attached Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel also filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1]The Board's original Decision and Order in Case 8—CA—6414 is reported at 195 NLRB 939 (1972).

Supplemental Decision and Order of the National Labor Relations Board [258 NLRB No. 2 (1981)]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, finding,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

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[2]We find no merit in Respondent's allegations of bias and partiality on the part of the Administrative Law Judge. Furthermore, Respondent's aspersion that the General Counsel and the Administrative Law Judge entered into a conspiracy to deprive Respondent of a fair trial is equally without foundation or merit.

Specifically, as to Respondent's contention that it was error for the Administrative Law Judge to deny Respondent's motion to sever the unfair labor practice case herein from the backpay proceeding on the grounds that the introduction of evidence as to the backpay case would improperly influence the Administrative Law Judge's decision in the unfair labor practice case, we conclude that it was not an abuse of discretion to deny Respondent's motion. Moreover, we note that, even if the Administrative Law Judge had granted Respondent's motion to sever, evidence of Respondent's previous unlawful conduct directed against employee Lena Barnhart would have been admissible to establish present motivation and to provide a complete background for the most recently alleged unfair labor practices.

[3]In his recommended Order, the Administrative Law Judge provided narrow "in any like or related manner" injunctive language. In order to provide more effective protection of rights under the Act, we conclude, even in the absence of exceptions, that a broad order is warranted. In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we held, *inter alia,* that "repeat offenders and egregious violators of the Act would be subject to the traditional Board remedy for conduct which requires broad injunctive relief." A brief review of the history of the proceedings in the present case clearly demonstrates Respondent's disregard for the rights of its employees and its contempt for the National Labor Relations Act and the decisions and orders of the National Labor Relations Board and the U.S. Court of Appeals for the Sixth Circuit. Employees Moore and Barnhart were unlawfully discharged over 10 years ago for lawfully engaging in union activities. Respondent has consistently delayed compliance, and failed to comply, with our original Decision and Order as enforced in 1972 by the U.S. Court of Appeals for the Sixth Circuit. 472 F.2d 1228. Thereafter, Respondent's purported offers of reinstatement in 1973 and 1975 were found to be improper and insufficient, and in 1979 the court of appeals found that Respondent was guilty of civil contempt

(Footnote continued on following page)

Supplemental Decision and Order of the National Labor Relations Board [258 NLRB No. 2 (1981)]

In his Decision, the Administrative Law Judge found, *inter alia*, that employee Lena Barnhart was entitled to an award of additional back pay as a result of the improper reinstatement on February 27, 1979, followed by the constructive discharge on March 19, 1979. In connection with this finding, the Administrative Law Judge, citing *Pierre Pellaton Enterprises, Inc., et al.*, 239 NLRB 1211 (1979), and *Vanguard Oil and Service, Inc., and Vanco Heating, Plumbing and Welding Co.*, 246 NLRB No. 22, sl. op., p. 2 (1979), ruled that the interest on the additional back pay award should be calculated at 6 percent since

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(Footnote continued from previous page)

of court. 592 F.2d 326. Furthermore, as found herein, Respondent's 1979 offer of reinstatement to Barnhart in response to the court's contempt order was also improper and insufficient. Scrutiny of this pattern of illegal conduct clearly indicates Respondent's bad faith in complying with the Board's and the court's remedial orders.

Moreover, a review of Respondent's history of committing unfair labor practices clearly demonstrates that, during the past 15 years, Respondent has uniformly committed unlawful acts in response to attempts to organize Respondent's stores. See: *S. E. Nichols Marcy Corp.*, 229 NLRB 75 (1977), enfd. by consent judgment No. 77—4154 (2d Cir. 1977); *S. E. Nichols Company, et al.*, 156 NLRB 1201 (1966), enfd. in relevant part 380 F.2d 438 (2d Cir. 1967); *S. E. Nichols-Dover, Inc.*, 159 NLRB 1071 (1966), enfd. 374 F.2d 115 (3d Cir. 1967); 165 NLRB 924 (1967); 167 NLRB 832 (1967), enfd. 414 F.2d 561 (3d Cir. 1969), cert. denied 397 U.S. 916 (1970); 179 NLRB 249 (1969), enfd. 73 LRRM 2816, 62 LC ¶10,752 (3d Cir. 1970), cert. denied 400 U.S. 831; *S. E. Nichols of Ohio, Inc.*, 195 NLRB 939, enfd. 472 F.2d 1228; *N.L.R.B.* v. *S. E. Nichols of Ohio, Inc.*, 100 LRRM 2840 (D.C. Ohio 1978), affd. 592 F.2d 326 (civil contempt); *S. E. Nichols Shillington Corp.*, 195 NLRB 189 (1972), enfd. 475 F.2d 195 (3d Cir. 1973), cert. denied 414 U.S. 860. Unreported cases include: *N.L.R.B.* v. *S. E. Nichols Shillington Corp.*, Civil Action No. 75—1751 (3d Cir. 1975) (contempt); *De Prospero* v. *S. E. Nichols Marcy Corp.*, No. 76 CV 5 (D.C.N.Y. 1976) (Sec. 10(j) injunction granted); *Eisenberg* v. *S. E. Nichols, Inc.*, Civil Action No. 78—2613 (D.C.N.J. 1979) (Sec. 10(j) injunction granted).

In light of Respondent's unlawful actions in the present case, and its history of illegal antiunion conduct, we have, *sua sponte*, modified the Administrative Law Judge's recommended Order to include broad injunctive language.

the new violations herein, with respect to the improper reinstatement and constructive discharge of Barnhart, were encompassed under the original unsatisfied order for reinstatement enforced by the U.S. Court of Appeals for the Sixth Circuit and reinforced by the court's contempt order against Respondent for failure to comply. The General Counsel argues in his exceptions that the Administrative Law Judge's reliance on the above-cited cases to support his interest-rate determination is misplaced, and that, in order to fully remedy Respondent's most recent unfair labor practices, the contemporary formula for the computation of interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), should be applied to all back pay owed Barnhart from February 27, 1979, forward. We agree, in part, with the General Counsel's exceptions.

The Administrative Law Judge is correct in stating that the method of determining the appropriate interest rate as set forth in *Florida Steel* is not applicable in cases in which an earlier Order of the Board providing for a different interest rate has been enforced by a court of appeals. However, in the present case, Respondent's March 19, 1979, constructive discharge of Barnhart is a separate and distinct violation of the Act, which is subject to a separate enforcement action in a court of appeals, absent Respondent's voluntary compliance. Accordingly, we shall modify the Administrative Law Judge's recommended Order to provide that interest on Barnhart's back pay award from the date of her constructive discharge until such time as she is properly and fully reinstated to her former job or equivalent position, or voluntarily declines such reinstatement, be computed in the manner prescribed in *Florida Steel, supra.*[4]

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[4]In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the portion of the backpay award due employee Barnhart from March 19, 1979, forward based on the formula set forth therein.

Supplemental Decision and Order of the National Labor Relations Board [258 NLRB No. 2 (1981)]

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, S. E. Nichols of Ohio, Inc., New Philadelphia, Ohio, its officers, agents, successors, and assigns, shall take the action set forth therein and pay to each discriminatee as net back pay the amounts set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the following for paragraph 2(b):

"(b) Give back pay to employee Lena Barnhart for the period April 1, 1971, to February 27, 1979, in the sum of $34,121.47, with interest at 6 percent per annum computed on a quarterly basis to the time of payment. Additionally, make Lena Barnhart whole for any loss of earnings since her improper reinstatement of February 27, 1979, and constructive discharge of March 19, 1979, until such time as she is properly and fully reinstated to her former job or an equivalent position as set out in paragraph (c) below or voluntarily declines such reinstatement. This additional back pay shall be computed on a quarterly basis, with interest on the back pay due from February 27, 1979, to March 19, 1979, at 6 percent per annum computed on a quarterly basis. The interest on the back pay award from March 19, 1979, until such time as she is properly and fully reinstated, or voluntarily declines such reinstatement, shall be computed in accordance with the formula adopted by the Board in *Florida Steel Corpora-*

tion, 231 NLRB 651 (1977), reaffirmed in *Olympic Medical Corporation*, 250 NLRB 146 (1980)."

3. Substitute the attached notice for that of the Administrative Law Judge.[5]

Dated, Washington, D.C. September 18, 1981

John H. Fanning, Member
Howard Jenkins, Jr., Member
Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

[5]The introductory language contained in the attached notice is included to apprise Respondent's employees of their rights under the National Labor Relations Act.

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to reinstate employee Lena Barnhart to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and without discriminating against her in regard to tenure or any term or condition of employment because of her union activity or testimony before the Board or courts, or because she sought or seeks union or Board assistance in connection with her reinstatement, tenure, or conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Because the Board and the United States Court of Appeals for the Sixth Circuit found in 1972 that we had unlawfully discharged employee Lena Barnhart and Carolyn Moore, and because the court further found in February 1979 that we had failed to properly or promptly reinstate both employees to their former or equivalent jobs as ordered by the Board and Court, WE WILL pay to Barnhart and Moore, respectively, the sums found due to each as net back pay with interest for the period April 1, 1971, to February 27, 1979.

Because the Board further found that on February 27, 1979, we did not properly reinstate employee Barnhart to her former or equivalent job and caused her constructive discharge on March 19, 1979, WE WILL offer Barnhart her former job, or the equivalent if the former job does not exist, and WE WILL give Barnhart additional back pay, with interest, from February 27, 1979, until she is promptly and fully reinstated or voluntarily declines proper reinstatement.

Supplemental Decision and Order of the National Labor Relations Board [258 NLRB No. 2 (1981)]

S. E. NICHOLS OF OHIO, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, Room 1695, 1240 E. Ninth Street, Cleveland, Ohio 44199, Telephone 216—522-3126.

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

UNITED STATES OF AMERICA

Before the National Labor Relations Board
Division of Judges

S. E. NICHOLS OF OHIO, INC.

Respondent

and

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 698, AFL-CIO[1]

Charging Party

Cases 8-CA-6414
8-CA-7858
8-CA-9160
Back pay Proceeding

and

S. E. NICHOLS OF OHIO, INC.

Respondent

and

LENA BARNHART, An Individual

Charging Party

Case 8-CA-12909

William Shuzman, Esq.,
Cleveland, Ohio,
for the General Counsel.

Leonard W. Wagman, Esq., and
Robert S. Goodman, Esq.,
of *Golenbock and Barell*,
New York, New York
for the Respondent.

[1]By a merger of Retail Clerks Union and the Meatcutters Union sometime prior to the issuance on October 15, 1979 of the complaint in Case 12909 and the order consolidating its trial with the backpay proceeding, the name and identity of the Charging Party Union became United Food and Commercial Workers Union, Local 698, AFL-CIO, sometimes referred to as the Food Union, see paragraph 4(b) of said complaint and order (exhibit GC-1r, as amended November 8, 1979).

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

DECISION

Statement of the Case

HERZEL H. E. PLAINE, Administrative Law Judge:

The major portion of this case is the supplemental back pay proceeding to the original unfair labor practice case, 8-CA-6414. There the Board found on March 17, 1972, that Respondent, owner and operator of a chain of self-service discount department stores, had engaged in unfair labor practices, at its new Philadelphia, Ohio store, to discourage employee activity for, and membership in, the Charging Party (Union), including the discriminatory discharge of two employees, Lena Barnhart and Carolyn Moore, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), 195 NLRB 939 (1972).

The Board's decision and order in 195 NLRB 939, was affirmed and enforced by the U.S. Circuit Court of Appeals for the Sixth Circuit, 472 F.2d 1228 (C.A. 6, December 1972). However, Respondent delayed compliance, and failed to comply, with the Board and Court orders to proffer immediate reinstatement to employees Barnhart and Moore to their former or substantially equivalent jobs. Respondent's purported offers of reinstatement to the employees in 1973 and 1975, were found to be both dilatory and insufficient and resulted in a holding and order by the Sixth Circuit that Respondent was guilty of civil contempt of the Court. See U.S. Court of Appeals, Sixth Circuit, order of February 8, 1979 (exhibit GC-1f) based upon the November 3, 1978 report of U.S. District Court Judge Frank J. Battisti of the Northern District of Ohio as special master (exhibit GC-1d, as amended December 27, 1978, exhibit GS-1e), that followed an evidentiary hearing and recommendations by Magis-

trate Jack B. Streepy of the same U.S. District Court (exhibit GC-1c).[2]

In 1979, to purge itself of the contempt, Respondent offered reinstatement to employees Barnhart and Moore to which both responded by returning to work February 27, 1979.

Thereafter on April 19, 1979, the Regional Director issued a back pay specification (and notice of hearing) for both Barnhart and Moore indicating that the back pay periods for both began on April 1, 1971 and ended February 27, 1979 (exhibit GC-1g). However, employee Barnhart stopped working for Respondent on March 19, 1979, and, upon her charge filed June 12, 1979 (exhibit GC-1p), followed by Board complaint of October 15, 1979 (exhibit GC-1r), Respondent was accused of violating Section 8(a)(1), (3), and (4) of the Act by allegedly having failed to properly reinstate employee Barnhart on February 27, 1979, and by having constructively discharged her on March 19, 1979, because of her support of the Union and because she gave testimony under the Act. At the same time the Regional Director ordered consolidation of the new unfair labor practice complaint, Case 12909, with the back pay proceeding (exhibit GC-1r, supra); and, by amendment of the back pay specification (exhibit GC-1m), made clear the contention that the back pay period for employee Barnhart had not been ended with the purported reinstatement of February 27, 1979, but continued unabated because of Respondent's alleged failure to have offered her proper reinstatement and the constructive discharge.[3]

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[2]Case numbers 7858 and 9160 which appear in the caption of this backpay proceeding represent case numbers assigned to charges filed by the Union in connection with the deficient reinstatements of employees Barnhart and Moore in 1973 and 1975, which charges were forwarded to the Sixth Circuit Court of Appeals and eventuated in the contempt order against Respondent.

[3]No similar claim was made for employee Moore, who, following the reinstatement of February 27, 1979, continued working until August 20, 1979, when she left Respondent's employment of her own volition.

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

Trial of the back pay issues, consolidated with the new unfair labor practice issues affecting employee Barnhart, was held in New Philadelphia, Ohio on November 8, 9, 27, 28, and 29, 1979.[4]

On back pay, Respondent contested the use of comparative earnings of representative employees in computing back pay, the sufficiency of credits given for interim earnings in employee Moore's case, and the entitlement of employee Barnhart to any back pay for alleged absence of efforts on her part to secure other employment and thereby minimize Respondent's obligation for back pay.

On the alleged 1979 unfair labor practices against employee Barnhart, Respondent contended that she was properly reinstated on February 27, and voluntarily quit on March 19.

General Counsel and Respondent filed briefs. In addition, as a matter of discretion, upon Respondent's request stating a need, and over General Counsel's opposition, I permitted Respondent to file a reply memorandum, with opportunity to General Counsel to file a response.[5]

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[4]I denied Respondent's motion to sever trial of the unfair labor practice complaint from trial of the backpay issues, on the grounds that there was no prejudice to the Respondent by mingling the alleged new unfair labor practice with the backpay issues, particularly when the later events arose while the backpay proceeding was pending before the Board, and had a relationship to prior events and the length of the backpay period; and that the Board's regulation on backpay, 29 CFR 101.16, does not prohibit consolidation in one trial of backpay issues with issues relating to the existence of unfair labor practices, *N.L.R.B.* v. *International Union of Operating Engineers, Local 925*, 460 F. 2d 589, 80 LRRM 2399, 2407, 2408 (C.A. 5, 1972).

[5]General Counsel did not avail himself of the opportunity to respond, but did file a motion dated February 14, 1980, to strike the reply memorandum, largely because Respondent attached, as an Appendix A, and

(Footnote continued on following page)

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

Upon the entire record, including my observation of the witnesses and consideration of the briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is an Ohio corporation engaged in the business of operating retail department stores in several states, with its principal office and place of business in New York, New York. The self-service discount department store in New Philadelphia, Ohio, is the only facility involved in this proceeding.

Annually, Respondent receives gross revenues in excess of $500,000 from operations at the New Philadelphia store, and receives there goods valued in excess of $50,000 directly from points outside Ohio.

As the parties admit, Respondent has been and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

As the parties also admit, Retail Clerks International Associa-

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(Footnote continued from previous page)

referred to, a Board-obtained affidavit of employee Lena Barnhart dated June 18, 1979, which affidavit Respondent had use of as "R-7 for identification," Tr. 459-460, in cross-examining Barnhart, but which document was not offered and did not come into evidence. I agree with General Counsel that Respondent had no business using the reply memorandum as a means of attempting to introduce evidence that is not in the record, and Appendix A will be disregarded as well as the reference to it on page 13 of Respondent's reply memorandum. However, with that material eliminated, I see no basis for not considering Respondent's reply memorandum as argument. Accordingly, I deny General Counsel's motion to strike the reply memorandum in its entirety.

tion, Local 698, AFL-CIO, now known as United Food and Commercial Workers Union, Local 698, AFL-CIO (the Union), has been and is a labor organization within the meaning of Section 2(5) of the Act.

II. Respondent's Business Operation and Background leading to Backpay Proceeding

The Store

As derived from the case background, including the testimony of the current store manager Robert Ricer, who was store manager from February 1975 (and testified before me, and earlier before U.S. Magistrate Streepy in 1978), and the prior store manager James Durda, who was manager when the unfair labor practices were committed in 1971 and remained until February 1975 (but testified only before Magistrate Streepy), Respondent operates a self-service discount department store in New Philadelphia, Ohio, known as Nichols Discount City.

The store comprises 120,000 square feet of open merchandising or selling space, plus a stockroom. The merchandising area is divided into approximately thirty departments with usually one employee in charge of merchandising and ordering for that department.

Merchandising means seeing that the merchandise is properly and favorably displayed, answering customer questions, and, where only floor samples are displayed, assisting the customer in obtaining a desired item from the stockroom.

Ordering means keeping an eye on stock needs and informing the store manager of them. Most orders are requests, approved by the store manager, from a catalog and sent to the company

buyers in the New York City headquarters office for their approval.

Typically, though the department employees are sometimes referred to as department heads or department managers, each works alone, without regularly scheduled helpers. The department employees, by whatever name or title, are essentially clerks, and are hourly paid. They do not perform supervisory or managerial functions. Sales are consummated by the customer helping himself and taking the merchandise to be purchased to either the "front" cash registers operated by assigned cashiers or, if there is a "perimeter" register in the department, to that register operated by the department clerk or a cashier.[6]

The employee with top supervisory and managerial authority, is the store manager. He does all the hiring, firing, setting of pay rates and granting raises (within the limits set by the company headquarters), and approving both the major ordering of merchandise through the company headquarters catalog and buyers and the minor amount of local purchasing permitted.

As Store Manager Ricer testified, he has three salaried assistant managers (prior to 1976 or 1977 there were four). The assistant managers, with Ricer, comprise the total supervisory authority in the store. According to Ricer, each of the assistant managers has and [sic] area of the store to cover, and the duty to oversee the departments and employees in his area and to act in Ricer's place during his absence.

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[6]In special departments, such as major appliances, there are salespersons operating the department. In addition, there are store employees regularly assigned to the cash registers, the store office, and stock room. However, these employees, from time to time, become involved in the departmental floor work, when assigned by the store manager or assistant managers to provide relief for floor clerks or assistance to them in stocking their departments.

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

The store operated with two shifts of employees covering twelve hours, 10 a.m. to 10 p.m., Monday through Saturday, and eight hours on Sunday from 11 a.m. to 7 p.m. (prior it was 12 noon to 8 p.m.).[7]

The first shift (or day shift) covered from 10 a.m. to 5 p.m., five days per week (Mondays thru Thursdays plus Saturdays), and Fridays from 10 a.m. to 10 p.m. However, because each of the six days of the day shift included a one-hour non-paid lunch period, and a seventh non-paid dinner hour on Fridays, the first shift or daytime employees were scheduled and paid for forty hours per week.

The second or night shift covered from 5 p.m. to 10 p.m. (Mondays thru Thursdays plus Saturdays), with no lunch or dinner periods; and eight hours on Sundays 11 a.m. to 7 p.m., formerly 12 noon to 8 p.m.) with a half-hour non-paid lunch period, according to Manager Ricer.[8] Since the second shift was paid time and a half for its Sunday work hours, or a total 11¼ hours for the day, the second night shift employees were normally paid for 36¼ hours per week. While there appeared an inclination on the part of Respondent's counsel to view the second shift employees as part time employees, and to attribute a meaningful difference between them and first shift employees based upon this slight difference in scheduled paid hours between the shifts, there was considerable evidence discovered by the Board's compliance officer, Mr. James Hehnen, even among the incomplete records produced by Respondent, that a number of the second shift employees worked additional hours over substantial periods of time

[7]In August 1979, Sundays hours were reduced to six hours (12 noon to 6 p.m.).

[8]The six-hour Sundays, from 12 noon to 6 p.m., did not start until August 1, 1979, according to Manager Ricer, and would have no bearing on backpay preceding that date.

that brought their pay to and sometimes over 40 hours per week, and some first shift representative employees who did not work 40 hours per week for some considerable periods of time. Based upon this evidence and the testimony that showed the work of the shifts to be the same, I find no substantial distinction between the first and second shift employees for purposes of using both first and second shift employees as representative employees in arriving at back pay calculations. In this connection it should be noted, from former Store Manager Durda's testimony, that Respondent regarded all of the employees, except the store manager and assistant managers, as clerks for pay purposes, and that all of the employees had general duties that cut across departments (exhibit GC-2, transcript of testimony before Magistrate Streepy, p. 121). Store Manager Ricer corroborated this in pointing out that all employees put up displays, transferred merchandise, did pricing, stored materials, answered questions of customers, and cleaned; and that cashiers and office employees, were expected to spend and spent some of their time on the sales floor relieving and assisting the departmental clerks, who in turn spent time on the cash registers and assisting other clerks.

Store Manager Ricer testified that in 1979 he had 72 hourly employees of whom one-third, 24 employees, were on the second or night shift. This total employment represented, he said, a ten percent decrease in employment from 1975, with less people to do more work, since the store size had increased in 1977. Hence, some of the clerks, he said, had to cover more than one department each.

Employees Barnhart and Moore

Employee Barnhart began employment with Respondent on November 19, 1969, four days after the store in New Philadelphia opened on November 15, 1969. Barnhart worked in the

housewares department, second shift, for about eight months, then requested and was granted leave by the first store manager Barnes to care for an ill son. When Barnhart returned to work at the beginning of October 1970, the successor store manager James Durda put her back to work in the mens wear department but treated her like a new employee, among other things denying her the five cents per hour pay raise that had been given to the other employees.[9] Barnhart remained in mens wear until her discriminatory discharge of April 1, 1971.

Employee Carolyn Moore also started her employment with Respondent in November 1969, on the second shift, as a clerk in ladies wear, where she remained until her discriminatory discharge of April 1, 1971.

The Board found that employees Barnhart and Moore were the outstanding organizers for the Union among the employees, and that Respondent discharged them, on April 1, 1971, because of their Union leadership and to discourage Union membership among the employees, in violation of Section 8(a)(1) and (3) of the Act, 195 NLRB 939, 942-943 (March 1972), ordering, among other things, that Respondent offer them immediate and full reinstatement to their former jobs, or, if these jobs no longer existed, to substantially equivalent positions, without prejudice

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[9]Employee Barnhart testified before me concerning, and established the grant of, the leave of absence by Manager Barnes, without contradiction by Respondent; and under the Board decision, 195 NLRB 939, 943, n. 20, was accordingly entitled to makeup pay at five cents per hour for the last quarter of 1970 and the first quarter of 1971, preceding her discriminatory discharge on April 1, 1971, since Manager Durda had conceded her entitlement to the pay raise but had conditioned it upon her abandonment of support of the Union. Accordingly the backpay specification properly included, as the first items for Barnhart, this makeup of the denied pay raise totaling the principal sum of $41.13, see exhibit GC-1g, App. B1 and B2.

to their seniority or other rights and privileges, and to make them whole for any loss of earnings. The Board decision was upheld and enforcement of the Board's order granted by the U.S. Circuit Court of Appeals for the Sixth Circuit, 472 F.2d 1228 (C.A. 6, December 1972).

As later found by the Sixth Circuit, in subsequent contempt proceedings against Respondent, it was more than six months after the Court's enforcement judgment that Respondent offered employee Barnhart reinstatement, and when she reported for work on July 16, 1973, Store Manager Durda assigned her to scrubbing the fitting room in the mens wear department, work she had not done before. After several hours of scrubbing she became ill and had to leave. Her doctor told her the cleaning product she was obliged to use in the scrubbing caused the illness, and when she told this to Manager Durda, he answered it was store policy to use this cleaning product and if she could not use it, there was no use in her coming in. By letter, employee Barnhart informed Manager Durda that she was being started out as a new employee rather than one with seniority, and that she desired full reinstatement.

Barnhart did not receive a response until almost two years later in March 1975, when Durda's successor, Store Manager Ricer, offered her "full reinstatement." In response to this second offer employee Barnhart reported for work on April 7, 1975. She was reviewed as an extra person who could be switched from one department to another as needed, and for the ensuing two weeks her job consisted of scrubbing with soap and water and doing cleaning in six different departments, though it was contrary to normal policy to have an employee clean more than one department even in a general cleanup. When informed that her next work would be scrubbing in the automotive department she resigned rather than do the scrubbing.

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In employee Carolyn Moore's case, she returned to Respondent for employment (also following a dilatory offer of reinstatement by Manager Durda) a week after Barnhart's start, on July 23, 1973, which was shortly after the birth of her daughter, of which Durda was apprised. Upon reporting, Moore was informed that her pay would be the same pay as when discharged, which was twenty cents per hour less than contemporaries who had continued to work between April 1971 and July 1973 were receiving; that her prior weekly hours were reduced to 28 hours; and she (like Barnhart) was immediately assigned to scrubbing bins in the mens wear department. Her job before discharge had been in ladies wear where she had never done any scrubbing or cleaning other than dusting. On the second day, she was told to continue scrubbing in the mens wear department, and when she complained about such work, was told that after completing scrubbing in mens wear she would do more scrubbing in the boys wear, ladies wear, and automotive departments. Upset by this assignment she clocked out, and was later informed by Manager Durda that she was no longer an employee because she walked off the job. Moore informed Durda in writing that she wanted full reinstatement as a clerk, not as a janitor, to her former hours and at the contemporary wage scale.

Respondent did not reply to employee Moore until more than two years later, in October 1975, when Respondent again offered her reinstatement. The offer did not mention a department but stated she was subject to being assigned and moved to any department at the manager's discretion, gave no assurance that she would not be scrubbing in various departments, and was at an hourly rate less than was being paid to similarly situated employees. Because of the lack of assurances and the lower pay, employee Moore declined to return to Respondent's employment.

Magistrate Streepy found that Respondent had deviated sub-

stantially from its obligation under the judgment of the Sixth Circuit to offer employees Barnhart and Moore immediate and full reinstatement to their former positions or to substantially equivalent positions, both in 1973 and 1975. The deviation from full reinstatement included treating each as an extra person subject to working in many departments, rather than assigning each to a department as prior to discharge; assigning both to scrubbing duties that they had not been assigned to prior to discharge, and to scrubbing in more than one department; failure to offer or pay the higher wage rates to which they would have been entitled had they been working and not wrongfully discharged, since April 1971; ordering Barnhart not to use the cash register contrary to her duties prior to discharge; and cutting Moore's workweek by fifteen percent. Additionally, it was found that Respondent failed in its obligation to offer immediate reinstatement by taking six months after the Court's judgment of enforcement to make its first offers of reinstatement in 1973, and approximately two more years to make its second offers of reinstatement in 1975. It was recommended that Respondent be adjudged in civil contempt of the Court. (Magistrate's Report of September 28, 1978, exhibit GC-1c). The U.S. District Court approved the magistrate's report and recommendations (exhibits GC-1d and -1e), and on February 8, 1979, the U.S. Court of Appeals for the Sixth Circuit issued its order affirming the approved magistrate's report and adjudging Respondent in civil contempt for violating the Court's judgment of December 1972. (exhibit GC-1f).

The Court ordered Respondent to purge itself of the contempt by, among other things, offering forthwith full reinstatement to Barnhart and Moore to their former position, or, if the positions no longer existed, to substantially equivalent positions, crediting them with pay increases granted employees in comparable positions while the two were not working for Respondent, and making them whole for lost wages to be computed in a supplemental

proceeding by the Board, subject to review of the Court. The order also provided that upon reinstatement, Respondent would refrain from imposing or threatening to impose any undue or burdensome working conditions or tasks upon Barnhart and Moore which are not regularly requested of other sales clerks.

Thereafter in February 1979, Respondent offered reinstatement and, on February 27, 1979, both employees resumed employment at Respondent's store.

III. The 1979 Unfair Labor Practice

When employees Barnhart and Moore returned to work on February 27, 1979, neither was reassigned to her former 1971 position, which for Barnhart had been second shift mens wear clerk, and for Moore second shift ladies wear clerk. Those jobs existed, nevertheless, Barnhart was sent to the lamps department on the second shift, and Moore was sent to the front registers on the second shift.

Store Manager Ricer, who had been manager since February 1975, and who participated in the improper and aborted reinstatement of employee Barnhart in April 1975 and in the inadequate offer of reinstatement to employee Moore in October 1975, did not discuss this change in positions with either employee.[10]

After several months, said Moore, Respondent began to shift her from the front registers to department after department, e.g. sporting goods, garden shop, cameras, to fill in and relieve others or temporarily replace others who were not there. She observed,

[10]What Manager Ricer did talk about, according to his own testimony, was that he wanted what happened since 1971 to be "water under the bridge."

she said, that she was being passed over by more junior employees for promotions or transfers to more stable or desirable positions, and finally quit the job on August 29, 1979. However, while she aired her unhappiness with other employees, she did not discuss it with Respondent's management, and she filed no charge with the Board.

In employee Barnhart's case, Manager Ricer had employee Frances Kee, who held the daytime lamps department job, show Barnhart initially what was entailed. Barnhart testified that for the first two weeks she rotated between the lamps department and the cash registers (a few hours per week).

At the start of the third week, Monday, March 12, 1979, according to employee Barnhart, Assistant Manager Dill asked her to work for a week in the housewares department to put the place in order, including cleaning, because, as he told her, it was a disorganized mess and they had not been able to keep clerks there. She started to put the housewares department in order. On Thursday, March 15, when Barnhart came in she found another clerk or office girl named Powers from the first shift checking in an order of new merchandise, and, when Barnhart offered to help, Powers declined the offer. Thereafter when Powers told Barnhart to stock the new merchandise, Barnhart suggested that since Powers had checked the merchandise she'd better stock the merchandise herself. Powers was not a supervisor, and, in the absence of finding Assistant Manager Dill or Manager Ricer, Barnhart discussed with Assistant Manager Hathorn the matter of a nonsupervisor giving her orders. By his own testimony, Hathorn evaded any issue because he regarded Barnhart as a "special situation" who had come back as a result of court action; and, as Barnhart testified, there was no discipline or reprimand of her then or later by Ricer or Hathorn or any supervisor for the course of action she had pursued, which included resum-

ing the cleanup and reorganizing of the housewares department that she had started.[11]

Friday was not a second shift workday, and on Saturday, March 17, employee Barnhart resumed her work in the housewares department. Assistant Manager Dill told her she had been doing a "marvelous" job in putting the department in order (and conceded he had said so), and asked her if she wanted the housewares department on a regular basis. Barnhart replied yes, that she regarded the work of the housewares department as a challenge and liked it better than the lamps department. Dill told her she would stay on in housewares.[12]

On Sunday, March 18, employee Barnhart continued working in housewares, with some intervals on the cash registers.

However, Manager Ricer claimed that on Monday, March 19, the day shift lamps clerk, Mrs. Frances Kee, asked Ricer for the return of employee Barnhart to the lamps department night shift, and he told Kee to tell Barnhart she was back in lamps. Ricer did not himself tell Barnhart, nor did he tell Assistant Manager Dill or ask Dill to inform Barnhart. Though employee Kee supported Ricer's claim that she had asked Ricer for Barnhart, I find it hard to believe, because Kee made it plain, in her testimony, that she was quite wary of dealing with Barnhart and had been warned that Barnhart was figuring out a reason to say she

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[11]Assistant Manager Dill, who had housewares as one of his departments, testified that he was in the store on Thursday, March 15, and never directed employee Barnhart to assist employee Powers.

[12]In his testimony, Assistant Manager Dill claimed he didn't have authority to transfer employee Barnhart to housewares, but admitted that he created the impression that he needed and wanted her there and that she would stay on. He also said the whole matter was not something he clearly remembered. I credit Barnhart's account that she was promised the housewares job.

had been picked on and, she (Kee) did not want to give Barnhart an excuse for leaving, as had happened in the 1975 reinstatement. Since, as employee Kee testified, she had not known or met employee Barnhart before Barnhart came back to the store on February 27, 1979, and had not previously known of the events relating to the 1975 reinstatement and constructive discharge of Barnhart, it is obvious that Manager Ricer, who was Respondent's store manager and instrument in causing the constructive discharge of Barnhart in 1975, was the source of Kee's views regarding Barnhart.

In any event, at the start of the 5 p.m. shift on Monday, March 19, according to Barnhart, employee Kee told Barnhart she was to go back to the lamps department. Barnhart questioned the order, saying it was odd that a fellow employee had more authority than Assistant Manager Dill who had told her on Saturday, March 17, that the housewares department was now her regular assignment. Kee replied that it was Manager Ricer's order that she was conveying. Barnhart couldn't find Dill, and went to the lamps department and to work, following a list of things to be done left by day shift employee Kee, according to Assistant Manager John Caravati, who had the lamps department under his charge. The list was principally concerned with cleaning and dusting of tables, lamps, shelves, mirrors, and picture frames. Some time later in the evening, Caravati said, he was paged by employee Barnhart, saying she had completed the work she had to do. Caravati came by, checked to see that Barnhart had done the work to his satisfaction, and told her that she had done a good job.

Employee Barnhart then asked Assistant Manager Caravati shouldn't she go back to housewares, her regular assignment, and Caravati replied he knew nothing about it, that she was in Assistant Manager Dill's jurisdiction. Caravati suggested that

this might be a good time for him to take Barnhart to, and acquaint her with, the lamp portion of the stockroom and for her to put it in order.[13]

As Caravati and Barnhart were talking on the sales floor, Manager Ricer came to them and, in angry tones, began addressing Barnhart on the sales floor with Caravati present. He accused Barnhart of taking (in his words) 14 to 20 minute breaks or 12 to 20 minute breaks, whereas she was entitled only to 10 minute breaks; and he concluded by telling her she was to stay in the lamps department and not leave it for any reason. When Barnhart attempted a reply, Ricer told her to take the chewing gum out of her mouth. Ricer went back to his office taking Caravati with him.

Hurt by the reprimand and rebuff, for which there had been no prior warning, employee Barnhart went forward to the office, clocked out and told Manager Ricer that he should not have talked to her as he had, that she was not a dog, and that she was going home. Ricer made no effort then to persuade her to stay or thereafter to call her to come back.

Conclusion

If the employment of employee Barnhart had been a new employment in 1979 there would obviously have been no question of an unfair labor practice.

However the 1979 employment was supposedly a reinstatement to a former position, ordered by the Board and Court of

[13]Assistant Manager Caravati was not too strong on recollection, stating in his Board affidavit that he directed Barnhart to go to the stockroom (not that he was taking her there) and put the lamps in numerical order for filling customer orders.

Appeals, to enable Respondent to purge itself for contempt of the Court in twice previously failing to appropriately reinstate two employees discharged for engaging in union activity, which employees had also testified against Respondent on that account.

The problem with the 1979 reinstatement started at the inception, when Respondent made no effort to restore the two employees to their former positions and offered no explanation for not doing so.

In employee Barnhart's case the former position was clerk of the mens wear department, second shift, which was in existence, and to which she was not assigned, without explanation. Instead she was told she was to go to the lamps department, second shift, and that she would get her instructions from the clerk of the first shift.

What she was not told by Manager Ricer was that he was not giving her a regular departmental job in a department, with a perimeter register which would entail working there regularly and only occasionally filling in elsewhere where needed; but that, as he testified, she was to be unique, the only employee who would be doing her type of job, starting in a department that had no perimeter register and moving from place to place as shortages of help developed. As Assistant Manager Dill explained it, Barnhart "was kind of a free girl [who] didn't have any particular place to go." This was exactly the kind of assignment of which the Sixth Circuit had been critical in reviewing the 1975 reinstatement of Barnhart, except that the 1979 job did not initially include the rapid changes and heavy scrubbing work imposed in 1975. More subtly, this time, Respondent did not show its hand in the first two weeks.

In the third week the changes began, with assigning employee Barnhart to a heavy cleanup job of cleaning and putting in order

the disordered housewares department. Barnhart rose to the challenge and won the praise of Assistant Manager Dill, so that at the end of the week, on Saturday, March 17, 1979, Dill offered her, and she accepted, the regular assignment as clerk of the housewares department. Barnhart was pleased and if the assignment had continued it might have eventuated in restoration to the equivalent of the job from which she had been discharged.[14]

However, this was not what Manager Ricer had in mind. Without telling Barnhart directly, or having Assistant Manager Dill tell her, Ricer yanked her back to the lamps department for an additional cleanup job. He did it in the humiliating fashion of having a fellow employee, rather than a supervisor, give her the order to return and directions on what to do, just as he had done in the previous week when he had an office girl give Barnhart directions in housewares—in effect letting Barnhart know that she was just a utility girl assisting other employees.

Manager Ricer added to the humiliation of Barnhart by bawling her out on the sales floor in the presence of a supervisor (and of anyone else within earshot) on two matters of personal conduct that he had not previously mentioned to her before, viz., allegedly taking breaks longer than ten minutes and chewing gum. Significantly, Ricer admitted that it was not his practice to discuss matters of employee conduct or discipline or reprimand on the sales floor, rather he reserved any such discussions for the privacy of his office or at the very least held them off the sales floor and out of the presence of others, so as not to embarrass the employee he was addressing. Moreover, Ricer conceded on cross-examination that he had never disciplined an employee for violation of the ten minute break rule or for chewing gum. And

[14]It will be recalled that the second shift housewares department was employee Barnhart's first job assignment without Respondent in 1969-1970.

there was testimony that employees did take longer than ten minute breaks and did chew gum on the sales floor.

Manager Ricer claimed that his accusation of Barnhart taking 14 to 20 minute or 12 to 20 minute breaks rested upon his examination of timecards, particularly Barnhart's card for the week ending March 17, 1979 (exhibit R-13). General Counsel was able to demonstrate that the card punches and cross outs on the Monday relating to the alleged 20 minute break were ambiguous, which, Ricer said, might have been due to someone else punching Barnhart's timecard, so that it was not clear whether the break taken was for 20 minutes or for 9 minutes. Yet Ricer without any private or other advance questioning of employee Barnhart publicly reprimanded her for taking a 20 minute break.

By depriving employee Barnhart, on March 19, of the right to leave the lamps department, Manager Ricer was, among other things, depriving Barnhart of the use of the cash registers in her employment (lamps department had no cash register). As Magistrate Streepy pointed out in his findings for the Sixth Circuit (exhibit GC-1c, p. 10) this had, in effect, been done to employee Barnhart in the improper reinstatement of 1973 and was contrary to the duties and authority she enjoyed prior to discharge.

Not only from the testimony of Manager Ricer, but also from the testimony of his assistant managers, Dill, Hathorn, and Caravati, and of employee Frances Kee *supra*, it was obvious that employee Barnhart was being treated differently from other employees.

From this record, it would appear that Respondent failed to offer to reinstate, and failed to reinstate, employee Barnhart to her former position, without prejudice to her seniority or other rights and privileges, or to even an equivalent position, in violation of the contempt order of the United States Court of Appeals for the Sixth Circuit. The alleged reemployment of February 28-

March 19, 1979, did not constitute the required reinstatement following the discriminatory discharge and did not toll the backpay period for employee Barnhart. *Padre Dodge,* 189 NLRB 378, 388 (1971).

Moreover, Respondent's conduct in the period February 27-March 19, 1979, culminating in the events of March 19th, constituted a constructive discharge in violation of Section 8(a)(1), (3) and (4) of the Act. The disparate treatment accorded Barnhart in 1979 largely by, or at the direction of, Respondent's Store Manager Ricer, who participated in the improper reinstatement and unlawful termination of Barnhart's employment of 1975, has underlying it the unlawful anti-union motivation for the discharge of Barnhart in 1971, 1973, and 1975, including reprisal for her testimony against Respondent. By reason of its animus, Respondent was making icily clear that there was no way that employee Barnhart could expect to be restored to equal treatment with her peers among the employees. Respondent was treating Barnhart in a manner designed to cause her to quit. Compare similar situations and findings in, *Carter of California,* 250 NLRB No. 54, slip op. pp. 6-7 (1980), companion decision 250 NLRB No. 53, slip op. pp. 16-18 (1980); *JIB Industries,* 245 NLRB No. 75, slip op. pp. 2-9 (1980); *Vita Foods,* 154 NLRB 1716, 1720 (1965).

By quitting the job on March 19, 1979, employee Barnhart was not wilfully incurring any loss of pay, and did not render herself unemployable. Hence, by reason of the constructive discharge in addition to the improper reinstatement, the backpay period for employee Barnhart was not tolled in 1979 and continues until Respondent remedies the original violation.[15]

[15]In employee Moore's case, there was evidence of a similar failure by Respondent to fully reinstate and of treatment designed to cause her to quit, which she did in August 1979. However, Moore filed no charge against Respondent, and on the assumption that hers was a voluntary quit, the backpay period was tolled as of February 27, 1979.

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VI. The Amount of Backpay

Since the backpay period for both claimants Barnhart and Moore extended for at least an approximate eight year span from April 1, 1971 until February 27, 1979 (and has continued for Barnhart because of her improper reinstatement on February 27 and constructive discharge on March 19, 1979), General Counsel used the earnings of a group of representative employees from which to derive an average of earnings for each calendar quarter of the backpay period.

This method was in keeping with the broad discretion vested in the Board to devise methods for compensating the discriminatorily discharged employees for what they would have earned (gross backpay) had they remained in the Company's employ throughout the backpay period, minus properly allocatable earnings in other employment during that period to produce net backpay. Since it is difficult to arrive at the precise amounts of gross backpay, the Board may use close approximations and adopt formulas reasonably designed to produce such approximations.

The use of representative employees in computing gross backpay is such an approved formula, *N.L.R.B.* v. *Brown and Root, Inc.*, 311 F.2d 447, 452-453 (C.A. 8, 1963), and has been frequently used in cases where the backpay period is lengthy and where it may be difficult to determine the probable path of a particular discriminatee during the period, *Midwest Hanger Co.*, 221 NLRB 911, 915 (1975). The employees who qualify as representatives are those in similar classifications earning similar wages at the time of the discharges. *Id.*, at 915.

General Counsel's compliance officer, James Hehnen, on the basis of available records (and not all back records were available) used five representative employees, namely, Marilyn Altier,

Karen Clark, Linda Johnson, Phyllis Levengood, and Kay Paris.[16] All five employees were contemporaries of employees Barnhart and Moore, similarly serving as clerks with like duties in their respective departments and each earning $1.85 per hour and generally similar quarterly earnings at the time of the discharges of Moore and Barnhart.[17]

The method of computation employed by the compliance officer was to take the earnings of the five representative employees in each calendar quarter year of the backpay period, add them, and divide by five. The quotient in each quarter represented the average representative earnings for which each of the two backpay claimants were credited in each calendar quarter in which she was eligible for backpay, subtracting interim earnings of the claimant applicable in the quarter.[18]

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[16]In the period from the third quarter of 1973 through the fourth quarter of 1975, when employee Johnson, having resigned, was not in Respondent's employ, earnings of employee Kathy Shilling were substituted to maintain the representative pattern; however, then Shilling resigned and Johnson returned, and use of Johnson's earnings, commencing with the first quarter of 1976, was resumed. See, *N.L.R.B.* v. *Superior Roofing Co.*, F. 2d , 80 LRRM 2458 (C.A. 9, 1972). Johnson was a cashier before she resigned, however all departmental clerks worked as cashiers; and when she returned, worked in the office, but all office workers and cashiers were expected to do some work on the sales floor, see heading II above.

[17]Barnhart was actually being paid only $1,80 per hour though entitled to, and wrongfully denied, the $1,85, see discussion above under heading II noting allowance to Barnhart in the backpay for this five cents per hour underpayment in the latter part of her 1969-1971 employment.

[18]Calculation of gross and net backpay, as well as interest on net backpay, is by calendar quarters, as established in *F. W. Woolworth Company*, 90 NLRB 289 (1950), approved in *N.L.R.B.* v. *Seven-Up Bottling Co. of Miami*, 344 U.S. 344 (1953); *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962); *Florida Steel Corporation*, 231 NLRB 651 (1977). While Respondent seemed to complain of this practice at trial, he did not provide any basis for altering it.

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Using quarterly gross earnings of the representative employees has the value of giving the discriminatees the benefit, to which they are entitled, of wage increases (since the gross earnings is a factor of hours times wage rate), which was not otherwise determinable under Respondent's practice of granting only discretionary wage increases; and of including wage increases from promotions, which it was reasonable to assume would occur had employment not been discriminatorily ended, for Moore and Barnhart, and which occurred in the cases of several of the representative employees, compare, *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168, 84 LRRM 2839, 2846-2847 (1973); *Mooney Aircraft Co.*, 164 NLRB 1102, 1103 (1967). The promotions moved the recipients to a higher paying clerical status but not to status as supervisors. In this connection, the evidence was that these better paying jobs were filled by employees who started with lesser paying work and were moved up. Both Moore and Barnhart were reportedly good workers, hence the assumption that they would have moved up, if their employment had not been unlawfully terminated, was not unreasonable.

Respondent argued that mixing employees who had been or become first shift employees (Paris, Levengood, and Johnson), with second shift employees (Clark and Altier), in constituting the five representative employees made the representative earnings unrepresentative, on the assertion that the first shift put in 40 hours and the second shift 37 hours (as employee Moore claimed), or 36-¼ hours (as Manager Ricer claimed), or a mix of "full time" and "part time" employees. However, as found under heading II above, the shift hours were scheduled hours and frequently not actual hours. For example, the only evidence respecting hours worked by first shift or alleged "full time" employees Levengood and Paris, showed that Levengood worked less than 40 hours in 8 out of 13 weeks of 2d quarter 1971, in 8 out of 12 weeks of 4th quarter 1972, in 10 out of 13 weeks

of 2d quarter 1973, in 11 out of 13 weeks of 3d quarter 1973; and that Paris worked less than 40 hours in 4 out of 13 weeks of 2d quarter 1971, in 2 out of 11 weeks of 3d quarter 1972, in 5 out of 13 weeks in the 2d quarter of 1973, and in 3 out of 12 weeks in the 3d quarter of 1973. Moreover comparing the quarterly earnings of second shift or alleged part time employees Clark and Altier with the three alleged full time employees (Levengood, Paris, and Johnson, including Shilling when substituted for Johnson), as derived from exhibit GC-3 and testimony of Compliance Officer Hehnen, alleged part timer Clark's earnings in 2d quarter 1971 exceeded the average quarterly earnings based in part on the earnings of the three alleged full timers. In 3d and 4th quarters 1971, "part timer" Clark's earnings were 3% lower than the average earnings based in part on the earnings of the three "full timers." In 1st quarter 1972, "part timer" Altier's earnings exceeded each of the three "full timers" as well as the average based in part on the earnings of the three "full timers." Also in 1st quarter 1972, "part timer" Clark's earnings exceeded the earnings of "full timer" Levengood and were about 1% below those of "full timer" Paris. In 2d quarter 1972, "part timers" Clark and Altier each had earnings in excess of "full timers" Levengood and Paris had higher earnings than the average based in part on the earnings of the three "full timers." In 3d quarter 1972, "part timer" Altier's earnings were 2% below the average based in part on the earnings of the three "full timers." In 4th quarter 1972, "part timers" Clark and Altier each had earnings in excess of "full timers" Levengood and Paris as well as earnings in excess of the average based in part on the earnings of the three "full timers." In 1st quarter 1973, "part timers" Altier and Clark had earnings about 5% below the average based in part on the earnings of the three "full timers," but each exceeded the earnings of "full timer" Johnson. In 2d quarter 1973, "part timer" Altier had earnings about 1% below the average based in part on the earnings of three "full timers." In 3d

quarter 1973, "part timers" Altier and Clark each had earnings higher than "full timer" Shilling, and "part timer" Clark's earnings were 5% below the average based in part on the earnings of the three "full timers." In 4th quarter 1973, "part timer" Clark's earnings exceeded those of "full timers" Levengood and Shilling and exceeded the average earning based in part on the earnings of the three "full timers"; and "part timer" Altier's earnings exceeded the earnings of "full timer" Shilling. In 1st quarter 1974, the earnings of "part timers" Altier and Clark each exceeded those of "full timer" Shilling; and Altier's earnings were about 2% below, and Clark's were about 7% below, the average based in part on the earnings of the three "full timers." In 2d quarter 1974, "part timers" Altier and Clark had earnings each exceeding those for "full timer" Shilling; Altier's earnings were about 8%, and Clark's earnings about 6%, below the average based in part on the earnings of the three "full timers." In 3d quarter 1974, "part timer" Altier's earnings exceeded those of "full timer" Shilling and was about 7% below the average based in part on the earnings of the three "full timers." In 4th quarter 1974, "part timers" Altier and Clark each had earnings higher than "full timer" Shilling, and Clark's earnings were 2% below the average based in part on the earnings of the three "full timers." In 2d quarter 1975, "part timers" Clark and Altier had higher earnings than "full timer" Shilling, and Altier's earnings were about 6% below, and Clark's about 8% below, the average based in part on the earnings of the three "full timers." In 3d and 4th quarters 1975, "part timer" Altier's earnings were higher in each quarter than those of "full timer" Shilling. In 1st quarter 1976, "part timer" Altier's earnings were higher than those of "full timer" Levengood and were about 3% below the average based in part on the earnings of the three "full timers". In 3d quarter 1976, "part timers" Altier and Clark had earnings higher than those of "full timer" Johnson. And, in 1st and 4th quarters 1977, in 1st and 2d quarters 1978, and in January 1979, "part

timers" Altier and Clark had earnings exceeding those of "full timer" Levengood.

Thus, it appeared that often the so-called "full time" employees of the representative group worked less hours per quarter and earned less money per quarter than did the so-called "part-time" employees, and in many other instances the hours spent and dollars earned were about the same. Hence the distinction that Respondent sought to draw between "full timers" and "part timers" among the representative employees was not real, and the absence of the mix of the five employees would have tended to deprive the discriminatees of the benefit of averaging the highs and lows, the valleys and peaks, and the unfavorable as well as favorable, of the earnings of comparable employees, *Chicago Local No. 245 Graphic Arts Union*, 217 NLRB 1112 (1975).

Therefore, using the averaged earnings of the representative employees, I find that the amounts set down as gross backpay for each of the quarterly periods of the backpay specification, starting with the 2d quarter of 1971 through part of the 1st quarter of 1979 (see exhibit GC-1g, Item 5 in each of the Appendices B3 through B34 for employee Barnhart,[19] and the same in Appendices C1 through C32 for employee Moore), fairly and reasonably constitute the gross backpay for each of those periods, as summarized in column four of Appendix A, exhibit GC-1g. For the continuing discrimination against Barnhart, growing out of Respondent's improper reinstatement in the 1st quarter of 1979 and constructive discharge of March 19, 1979, additional calculations of gross backpay, similarly computed, will be needed.

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[19]Appendices B1 and B2 for Barnhart, state the makeup sums due Barnhart at five cents an hour during her employment in the 4th quarter 1970 and 1st quarter 1971.

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V. Interim Earnings

A. Barnhart

The duty of a discriminatee to minimize his loss of earnings in a backpay case had its genesis in *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 197-200 (1941). The Supreme Court decided that since only actual losses should be made good, deductions should be made not only for actual interim earnings of the discriminatee but also for losses of earnings which he wilfully incurred. It was held that the respondent who was liable for the backpay would be permitted to adduce proof of any such wilful loss of earnings.

Over the years, the Board has given fuller meaning to the concept of wilful loss of earnings, holding, among other things, that it entails the making by the employee of at least "reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience." *Southern Silk Mills,* 116 NLRB 769, 773 (1956), cited and quoted with approval in *N.L.R.B.* v. *Miami Coca Cola Bottling Co.,* 360 F.2d 569, 575 (C.A. 5, 1966).

However, the claim, made here by Respondent, that employee Barnhart failed to make such reasonable efforts, is an affirmative defense and the burden of proof is on the Respondent, *Id.*, and see *N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F.2d 170, 174 (C.A. 2, 1965), *cert. denied* 384 U.S. 97; *Florence Printing Co.* v. *N.L.R.B.*, 376 F.2d 216, 223 (C.A. 4, 1967), *cert. denied* 389 U.S. 840. The fact that General Counsel called upon the discriminatee to give evidence of her efforts to obtain other suitable employment did not shift the burden of the defense from the Respondent, *New England Tank Industries,* 147 NLRB 598, 601 (1964).

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Moreover, the backpay claimant is held only to reasonable exertions and not to the highest standard of diligence in seeking interim employment, *N.L.R.B.* v. *Arduini Mfg. Corp.*, 394 F.2d 420, 423 (C.A. 1, 1968). Hence the Respondent does not meet his burden to establish failure of the claimant to mitigate damages, by showing his lack of success in finding interim employment, *N.L.R.B.* v. *Cashman Auto Co.*, 223 F.2d 832, 836 (C.A. 1, 1955); *N.L.R.B.* v. *Pilot Freight Carriers,* F.2d , 102 LRRM 2579, 2580 (C.A. 5, 1979); or by showing very low interim earnings for the claimant, in comparison to the earnings of an employee of similar grade, *N.L.R.B.* v. *Miami Coca Cola Bottling Co., supra,* 360 F.2d at 575-576; or by showing absence of a job application by claimant in a particular quarter or quarters of the backpay period, *Cornwell Company,* 171 NLRB 342, 343 (1968); or by showing failure to follow certain practices such as reading and responding to newspaper advertisements of jobs, *N.L.R.B.* v. *Arduini Mfg Corp., supra,* 394 F.2d at 422; *De Lorean Cadillac, Inc.*, 231 NLRB 329, 331 (1977).

Lastly, the finding of the unfair labor practice and discriminatory discharge "is presumptive proof that some backpay is owed," *N.L.R.B.* v. *Mastro Plastics, supra,* 354 F.2d at 178; and any doubt in the evidence must be resolved in favor of the discriminatee as the innocent person rather than the employer responsible for the wrongdoing, *N.L.R.B.* v. *NHE/Freeway Inc.*, 545 F.2d 592, 594 (C.A. 7, 1976); *N.L.R.B.* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1319-1321 (C.A.D.C., 1972).

Employee Barnhart testified in detail concerning her efforts to obtain employment, with the aid of diaries and unemployment compensation notebooks (which were included in the evidentiary record), plus recollection stimulated by the aids. Barnhart testified credibly and without contradiction concerning these efforts.

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Following her discharge on April 1, 1971, Barnhart registered for employment with the Ohio Bureau of Employment Services, where she applied for and received (notwithstanding contest by Respondent) unemployment compensation for 39 weeks. As a condition of eligibility for benefits, she reported weekly to the Bureau to demonstrate her availability for work and her search for work, which dates she recorded in her unemployment compensation book. She received some job counseling from the Bureau but no referrals to jobs, and sought work on her own by physically going to places of likely employers. When her weekly benefits ran out, Barnhart continued to visit the Bureau on a monthly basis looking for any posting of jobs. In 1973, 1975, and 1979, following her brief but improper and aborted reinstatements by Respondent, Barnhart did not apply for unemployment compensation; but in her visit to the Bureau immediately following the 1979 constructive discharge, was sent on March 20, 1979, to test for a possible census taking job, which she did not get. While the backpay claimant's registration with the state employment service was not conclusive evidence of a reasonable search for employment, it was nevertheless evidence that the claimant did, in fact, seek work, *Madison Courier, Inc.*, 202 NLRB 808, 813 (1973), and *prima facie* evidence of a reasonable search, *Firestone Synthetic Fibers*, 207 NLRB 810, 812 (1973).

Employee Barnhart's basic method in searching for work was to visit and apply for work at stores, shops, restaurants and fast food shops, motels, nursing homes and hospitals, movie theatres, plants, and offices in the area of her residence, which was the small town of Dover, Ohio and the adjoining small town of New Philadelphia, plus outlying communities as far away as Canton, Ohio, which was about 26 miles from Dover. Her apparent expectation and hope was that, within her limited skills and training, she might find suitable employment.

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When employee Barnhart was discharged by Respondent in 1971 she was 43 years old. She had been a high school graduate, and before marriage (which was in 1949 at age 21) had worked at a dry cleaners and at the telephone company office as an operator. Her marriage in 1949 was to a farmer, and she helped work the farm with her husband, who was killed in 1953, leaving her with two infants ages 18 months and 7 months. She stayed at home to rear the children, and remarried in 1959. Two more children were born of the second marriage (in 1961 and 1965). Her second husband opposed her working, but changed his mind when he lost his job, and Mrs. Barnhart obtained employment as a clerk with Respondent when it opened its store in New Philadelphia in 1969. This was her background, which did not include any typing, stenography, bookkeeping or other office skills, when she started seeking new employment in April 1971.

Barnhart first applied at Buehlers Bakery in Dover on April 6, 1971, and went back again in June, without success. She also applied to Aberths Bakery in Dover in April at the suggestion of a friend and went back to them several times in 1971 and in succeeding years. She applied at Woolworths, W. T. Grants, A and P, Kroger, Safeway Department Store, Sales Department Store, J. C. Penney, Schwartz's Clothing Store, and Montgomery Ward, in Dover or New Philadelphia, in April and in the ensuing months of 1971, seeking work in those places and others like them as clerk or cashier.

Her method was to file an application, if the store or shop was taking job applications and many did not, and in any event talk to the store manager or other available supervisor or personnel employee; and, as the long record of these visits indicates, almost invariably revisited and reapplied at these and other stores, noted in this brief summary, in the months and years that followed.

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Barnhart also tried for factory or laboring work in several manufacturing plants, starting in 1971 and thereafter. Among these were Alsco, a manufacturer of mobile homes, and Snyder Manufacturing, local plants, and East Sparta Manufacturing, a tile manufacturer about seven miles from Dover. In August 1971, a friend told her of the possibility of a cleaning woman's job in the offices of Timken Roller Bearing Company in Canton. Though 26 miles away, the indicated pay of $4 per hour was much higher than the rate of pay she had been getting or that was being paid for jobs she was seeking in her area, and she drove to Canton only to find that the job had been filled when she arrived.

Among other types of businesses to which Barnhart applied were drug stores, such as Gray's and Marlowe's in Dover, where she sought clerk or cashier's work; a sewing shop—Printz Biederman—where her former co-worker Carolyn Moore had held a part time or "second" job; restaurants, such as Bassette's, Family Smorgasbord, and L and K Restaurant, where she sought work as waitress or cook; motels, such as Delphian Inn and L and K Motel; nursing homes, such as South Broadway Nursing Home and Valley Manor Rest Home, where she sought work as a nursing care helper since she had no previous training in nursing; the General Telephone Company where she had worked as an operator more than twenty years earlier; laundries, such as, Puritan, Dover-New Philadelphia Laundry, and Hammond Cleaners; applications at several out-of-town locations, such as at Navarre, Ohio (Nickles Bakery), Newcomertown, Ohio (General Tire, General Electric), and Canton (that included several places—Clark's Perkins, and Superior Meats—in addition to Timken); and applications to a variety of other shops and businesses that appeared to offer laboring or clerical opportunities.

Just about all of the job seeking done by Barnhart was on her own initiative with an occasional tip on possibilities from friends.

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Practically all of the inquiries and applications in the Dover-New Philadelphia area were made by her by walking (or driving and walking if a car was available) sometimes making special trips and sometimes in connection with shopping. This was feasible since many of the places were nearby and clustered in or about common areas, such as shopping centers. For applications outside the area of her residence she had access to a car or occasionally rode with a friend.

In the period of almost eight years from April 1971 through February 1979, Barnhart called upon more than 150 different employers (identified in the record), saw almost all of them more than once and saw some many times. A few of the repeat visits were in response to calls to come in for interviews. Following the constructive discharge by Respondent of March 19, 1979, Barnhart resumed her search for employment in the seven months to trial in November 1979, starting with the Ohio Bureau of Employment Services on March 20, 1979, and calling upon several new employers and some of those she had called on before, such as the bag factory, motels, and restaurants.

Going back to October 16, 1973, one of the applications for employment made was to Quik (or Quick) Shops, a convenience food store. There was no job opening at the time.

On January 27, 1974, Barnhart received a telephone call from Carolyn Moore who had taken a job as manager of the Quik Shops store about a month earlier. Moore told Barnhart that a girl at the store had left and Barnhart could have the former employee's job starting at $1.50 per hour. Barnhart accepted the offer and went to work for Quik Shops.

About six months later, on July 27, 1974, Barnhart terminated her employment with Quik Shops because she was mistakenly ac-

cused, along with two other employees, of a shortage of money from the cash register. The mistake was found and acknowledged and Barnhart could have stayed on, but declined to stay on the ground that she would not work where such false accusations had been made against her. Carolyn Moore was still there as manager but left in the following month.

On examination by Respondent, Barnhart testified that she seldom, almost never, used the help wanted advertisements in the local newspaper, the Times-Reporter, in seeking work, that when she occasionally looked at the ads they were mostly for baby sitting, housekeeping, and door-to-door selling, which she did not regard as suitable employment, and in other cases did not mention pay or time of day, and that she preferred to seek work on her own. However, she did testify that on one occasion in 1971, after she had applied to Alsco Manufacturing Co. on April 30, she went back on June 16 because of a newspaper ad indicating an opening for a laborer (for which she had earlier applied), but was not hired. She also testified that for some of the employers, concerning whom Respondent produced help wanted ads (for example, in 1978, Flex Products, Elby's Restaurant, Dutch Kitchen), she had applied for jobs, not because of the advertising and unaware of it then, but had not received job offers and did not turn down any job offers.

Barnhart also testified that apart from use of the public employment agency (the Ohio Bureau of Employment Services) she did not consider engaging the services of any private employment agency, saying why pay for getting a job when she could look for it herself and stating unawareness of jobs where the prospective employer might pay the agency fee.

Barnhart testified that for a 21-week segment of the backpay period—from May 24 to October 5, 1976—she temporarily

withdrew from the job market and did not search for employment. This was a period of time in which both her parents went through terminal illness and died. Thereafter, in October 1976, she resumed the search for employment, starting with Dover Molds, one of the factories in her area where she had filed an application at the end of the previous April. General Counsel has provided appropriate credit to Respondent in the backpay specifications by eliminating any claim for Barnhart in the 21 weeks occurring in the 2d, 3d, and 4th quarters of 1976 (see GC-1g, appendices B-23, 24, 25).

Conclusion

Respondent argues that employee Barnhart did not make reasonable efforts to find interim employment in the whole of the backpay period, because she did not make use of newspaper help wanted advertisements, or hire a private employment agency, to help find such employment; indeed, Respondent suggests that her failure to take either or both courses of action was in bad faith to avoid finding employment, and should result in denying Barnhart any backpay.

In the light of employee Barnhart's considerable efforts to find interim employment over a long backpay period, which period Respondent has unconscionably and unlawfully prolonged by stalling and refusing to restore the employee to her former position or equivalent employment, Respondent's argument comes down to a claim that the employee could have made greater or more efficient efforts in obtaining interim employment and should have been more successful in obtaining interim employment. This is speculation and assumption that does not carry the Respondent's burden of proof to show wilful failfure of the claimant to mitigate damages.

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In *Airport Service Lines*, 231 NLRB 1272, 1273 (1977), the Board held that the existence of the newspaper want ads does not establish that the jobs would be available if the claimant applied or that she would be selected for any available position. *Accord, Firestone Synthetic Fibers, supra*, 207 NLRB 810, 813-814; *Midwest Hanger Co., supra*, 221 NLRB 911, 919.

In *De Lorean Cadillac, Inc., supra*, 231 NLRB 329, 331-332, one of the backpay claimants was a highly qualified automobile salesman who at regular intervals in the backpay period applied to some 30 auto dealers in the Cleveland, Ohio area but did not secure employment, and was equally unsuccessful in seeking employment from insurance, realty, and brokerage firms. Respondent introduced evidence of regular newspaper advertising in two Cleveland newspapers by about 50 auto dealers, including some where the claimant had applied, indicating well over 700 ads for automobile salesmen in the backpay period. Combining this showing with claimant's testimony that he did not respond to the ads, indeed that he did not look for employment in the newspapers at all because he felt he could do better on his own by personal application to the dealers, Respondent contended claimant had not made a reasonable effort to find other employment, thus wilfully lost wages, and was not entitled to any backpay.

The Board held that when the claimant applied to auto dealers, upon his own, including some who had advertised as well as some who had not, he was rejected; hence there was no compelling reason to anticipate that if the claimant had responded to the advertisers he would have fared better than he did on his own; that there was no requirement that the discharged employee exhaust all possibilities in seeking interim employment; and that what was required of him was reasonable exertion, not the highest standard of diligence, as laid down in *N.L.R.B.* v. *Arduini Mfg. Corp., supra*, 394 F. 2d 420, 423.

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In *Arduini*, the Court noted that one of the backpay claimants did not believe in reading help wanted ads in newspapers, and the Court declined to attach any significance to the fact that the claimant did not follow the want ads, 394 F. 2d at 422, and further declined to measure the reasonableness of claimant's efforts to find work by his success or lack of success in finding it, citing *N.L.R.B.* v. *Cashman Auto Co., supra*, 223 F. 2d at 836.

In *Sioux Falls Stock Yard Co.*, 236 NLRB 543, 550-551 (1978), the backpay respondent provided evidence of newspaper ads to show that jobs existed in the backpay period and, because the backpay claimants had not applied for these jobs or even consulted the newspapers, contended that they had not made a reasonable search. The Board held that the respondent failed to meet its burden to show that any of the jobs were offered to the claimants; and see *Florence Printing Co.*, 158 NLRB 775, 793, aff'd 376 F. 2d 216 (C.A. 4, 1967), cert. denied 389 U.S. 840, holding that the Respondent, who claimed that there had been a lack of reasonable efforts by backpay claimants in failing to apply for "want ad" jobs, had not shown that "want ad" jobs were offered to them. In *Midwest Hanger Co., supra*, 221 NLRB 911, 919, it was held that in seeking interim employment, backpay claimants were not bound to consult newspaper ads.

Holdings of like import, in *Miami Coca Cola Bottling Co., supra*, 151 NLRB 1701, 1710 (1965), aff'd 360 F. 2d 569 (C.A. 5, 1966), that a backpay claimant is not required to exhaust every job possibility; and in *Madison Courier, Inc., supra*, 202 NLRB 808, 814 (1973), that a backpay claimant is not required to apply for every possible job that might have existed in the industry, suggest that backpay claimants are not bound to consult private employment agencies in making reasonable search for interim employment.

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Appraising Respondent's showing on the issue of employee Barnhart's search for interim employment, Respondent has offered no contradiction of her actual efforts, not even with an offer of a spot check of some of the employers to whom she applied (and there was time for this if Respondent chose to check in the recess before the trial was closed).

Moreover, Respondent has not shown that any of the jobs advertised in the newspapers were offered to Barnhart, particularly by employers who had done such advertising to whom Barnhart applied without knowledge of their ads. Nor has Respondent shown that Barnhart declined any job.

In connection with private employment agencies, Respondent brought in the head of a Canton, Ohio agency with a New Philadelphia franchised office, who offered a general numerical count of random samplings of job openings in certain parts of years 1974 through 1979 for what he classified as semi-skilled workers.[20] However he did not know employee Barnhart or if any jobs had been offered to her.

Thus, within the meaning of the applicable law, Respondent has not provided proof that Barnhart failed to make reasonable efforts to find interim employment.

In evaluating Barnhart's efforts to obtain interim employment, while Respondent looked at and counted only the number of days Barnhart sought employment, General Counsel looked, rightly I believe, at the actual visits to and inquiries of individual employers (because in a day's trip Barnhart usually called upon

[20]For example, he testified that in 1977, there were 19 available openings for semi-skilled females as retail store clerks, cooks, nurses aides, retail cashiers, machine operators, gas station cashiers, seamstress, and food handlers. He did not identify specific jobs.

several potential employers in common locations or close to each other), the repeat visits, and the visits to the state employment service. Thus General Counsel calculated that in the approximate eight years' backpay period dealt with at trial, from April 1971 to November 1979 (which excludes the six month interim employment with Quik Shops in 1974 and the 21-weeks withdrawal from the employment market in 1976), Barnhart made about 500 tries at obtaining employment in an approximate 400 week period. Scrutinizing the entire backpay period to determine reasonable continuing effort, as the Board has said must be done (making inconsequential a failure to search in any one quarter, *Cornwell Company, supra,* 171 NLRB at 343), it appears that Barnhart averaged better than one job inquiry per week in the entire eight year period. Her reapplications over the months and years to places that had not accepted her previously did not detract from the reasonableness of her effort, *Nickey Chevrolet Sales,* 195 NLRB 395, 396 (1972), *Sioux Falls Stock Yards, supra,* 236 NLRB at 552. And, noting her failure to remember to record (in the documents she kept and submitted for the record) some of the prospective employers she visited and applied to, and that the Board will not penalize the discriminatee for poor record keeping, *Sioux Falls Stock Yards, supra,* 236 NLRB at 563, the likelihood is that the number of job inquiries by her in the backpay period was higher than the above figures indicate.

Affirmatively, I find that employee Barnhart did make reasonable efforts to find interim employment, and that she is entitled to backpay from Respondent.

Respondent argues, alternatively, that if Barnhart's search for interim employment constituted reasonable efforts to find interim employment, she should be denied any backpay after July 27, 1974, when she quit her interim job at Quik Shops.

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However, as pointed out in *Mastro Plastics, supra,* 136 NLRB 1342, 1349 (1962), aff'd 354 F. 2d 170 (C.A. 2, 1965), cert. denied 384 U.S. 972, while a discriminatee who obtains interim employment and quits without good reason may not be entitled thereafter to backpay, if the discriminatee leaves the interim job for a justifiable reason he is not deprived of his further claim or backpay.

Here, employee Barnhart left her job with Quik Shops after six months employment because she was wrongly accused of taking money from the cash register receipts.

In an almost identical situation in *Ronald Hackenburger d/b/a Ron's Trucking Service,* 236 NLRB 1065, 1069, 1070 (1978), the backpay claimant quit an interim job because he was falsely accused of pocketing money from sales. The Board held that he quit with justifiable provocation and cause, and that he was not deprived of his further claim for backpay.

I think the situations are parallel. I find that employee Barnhart left her interim employment at Quik Shops upon justifiable cause and did not thereby impair her claim for backpay against Respondent.

B. Moore

When employee Carolyn Moore worked for Respondent before her discharge in 1971, she held a second job as a sewing machine operator with Printz Biederman Company. She continued this employment after her discriminatory discharge by Respondent on April 1, 1971.

The job with Printz Biederman was essentially full time work, usually performed between the hours of 7:30 a.m. and 3:30 p.m.,

Monday through Friday (no Saturdays or Sundays), which was the time the shop was open for work. However, she worked on a piece rate basis rather than hourly rate, and observance of hours was not essential, said Moore. Thus she frequently started as late as 8 a.m. and worked until she ran out of garments or to 3:30 p.m., whichever came first. It will be recalled, that Moore's hours in 1969-1971 with Respondent were 5 p.m. to 10 p.m. on 5 days per week (Monday through Thursday, and Saturday) and 12-8 p.m. on Sundays.

Moore continued with Printz Biederman through 1971, 1972, and early 1973 till April 15, with certain variations as indicated hereinafter.

Thus, in March 1972 when work was partially and temporarily down at Printz Biederman, though continuing wi h them for 3 or 4 hours a day, Moore took a job for one and a half weeks doing telephone soliciting from noon till 8 p.m. at Snyder Sheet Metal Co. She didn't like the work and would have been obliged to pay an employment agency fee if she stayed with Snyder, so she quit the brief job with Snyder, continuing however with Printz Biederman.

In April 1972, Moore obtained a job with City Wide Answering Service, a telephone answering service. Her hours were Monday and Tuesday from 11 p.m. to 7 a.m.; and three additional days of the week, as needed, from 5 p.m. to 11 p.m.

Moore continued with Printz Biederman till sometime in May 1972, and then started following Manager Goldman of Printz Biederman elsewhere on a succession of brief jobs doing sewing machine work as at Printz Biederman. She went with him first to Hess Company for one and a half months, then to Basic Items for two or three weeks, and then back to Printz Biederman for

the balance of 1972 and early 1973 until the end of April 1973. She was paid at piece work rates for the sewing. Scheduled hours were 7 a.m. to 3 p.m. for Hess and Basic Items, and 7:30 to 3:30 p.m. Monday through Friday at Printz Biederman, with, of course, the loose observance of those hours as already indicated.

Moore also continued the City Wide Answering Service job she started in April 1972 into 1973 up till April 15, 1973. The late night-early morning hours, originally 11 p.m. to 7 a.m. on Mondays and Tuesdays, became 12 midnight to 8 a.m., and the evening hours on three additional days per week, as needed, became 4 p.m. to 12 midnight.

Carolyn Moore temporarily withdrew from the employment market and ceased all work, in particular her work for Printz Biederman and City Wide, in the period May 1, 1973 to July 22, 1973, the last three months of a pregnancy that ended with the birth of a daughter.

Thereafter, at the end of July 1973, her first job was with Respondent in response to its call that she come in for the reinstatement that proved to be improper and which aborted in a constructive discharge after she worked a day and a half.

Following this constructive discharge, in August 1973 Moore obtained employment again with City Wide Answering Service and in October 1973 again with Printz Biederman, working the same hours as when she left both employers in April 1973.

At the end of December 1973, Moore left both jobs—with City Wide and Printz Biederman—to start a new job in January 1974 as manager of Quik Shops, a convenience food store, which paid her a base salary plus 2% commission on sales. Quik Shops store hours were 9 a.m. to 12 midnight, seven days a week. Moore testified that while she was not there all of the

time, she was there almost the entire time, and that she ultimately left the job in August 1974 because she had to put in too many hours for the pay involved.

Two days after leaving Quik Shops, in August 1974 Moore resumed work for City Wide Answering Service, with the two days of early morning service from 12 midnight to 7 a.m., and the three days of evening service from 5 p.m. to 11:30 p.m. She held this job and no other for the reminder of 1974.

In 1975, Moore continued with City Wide, same hours. She picked up about four months of additional work (mornings and early afternoons) from May to August 1975 with Printz Biederman, but that ended in August 1975 when Printz Biederman closed the shop.

Going into 1976, Moore continued with the work for City Wide, working Mondays and Tuesdays from 12 midnight to 8 a.m. and Wednesdays, Thursdays and Fridays from 4 p.m. to 12 midnight.

However in March 1976, she reduced her hours at City Wide to work no more than 32 hours per week after she enrolled in, and began attending, Tuscco Beauty School to learn cosmotology and to train for becoming a cosmotologist. Unfortunately, after four months of school, her husband was injured and Moore had to give up school in July 1976 without completing the course. Her school hours were 9 a.m. to 3:30 p.m. or sometime 4:30 p.m., and for City Wide, during that period, the most that she did was two days from midnight to 8 a.m., and two days from 4 p.m. to midnight.

When she resumed 40 hours per week work with City Wide in 1976 and continued through 1977 and into 1978, Moore did

two days of midnight to 8 a.m. work and three days of 4 p.m. to midnight work.

In May 1978, City Wide offered Moore straight midnight to 8 a.m. work, five days per week, and she shifted to that, and stayed with it during January and February 1979, and during the following approximate six months period of her reemployment by Respondent in 1979. Hence in those six months of 1979 she again held two full time jobs one of which was with Respondent, as she had in 1971 and earlier before her discharge by Respondent.

In the course of developing the concept that a discriminatee claiming backpay for loss of earnings has a duty to minimize the loss and not wilfully incur a loss, *Phelps Dodge Corp.* v. *N.L.R.B., supra,* 313 U.S. 177, 197-200, the Supreme Court approved the Board's practice of limiting deductions from backpay of worker earnings following discharge to net "earnings during the hours when the worker would have been employed by the employer in question," *Id.* at 198, note 7.

Hence earnings from a second or supplementary job or jobs, which the back claimant held before discharge and continued thereafter, or from second or supplementary jobs to which the claimant changed, where the earnings were for work performed outside the hours the claimant would have worked for the backpay respondent if not discharged, are not properly classified as deductible "interim" earnings and may not be deducted from the claimant's gross backpay, *N.L.R.B.* v. *Miami Coca Cola Co., supra,* 360 F. 569, 573-574; *Henry Colder Company,* 186 NLRB 1088, 1089-1090 (1970).

Accordingly, in the back pay specification General Counsel made only limited deduction from the gross backpay due em-

ployee Moore for earnings from the second or supplementary jobs which she held or acquired after her discharge in April 1971. As a result, all of Moore's earnings in the daytime hours from the sewing companies—Printz Biederman, *et al.*—have not been deducted, and properly so.

The earnings from City Wide Answering Service have been prorated between earnings, on the one hand from work during hours in which Moore might have worked for Respondent (5 p.m. to 10 p.m. five days of the week excluding Fridays, and 12 noon to 8 p.m. on Sundays), which earnings have been deducted from Respondent's gross backpay obligations to Moore; and, on the other hand, earnings outside what would have been her working hours for Respondent, which have not been deducted from Respondent's gross backpay obligation. The proration is an approximation, rather than actual hours, giving Respondent credit against its gross backpay obligation to Moore for three days out of five days per week of City Wide earnings or three-fifths of Moore's City Wide earnings in each quarter, up to the 2d quarter of 1978, and not crediting Respondent for two-fifths of the City Wide earnings constituting earnings for two days (Monday and Tuesday) per week of the five days per week Moore worked for City Wide in the hours 11 p.m. to 7 a.m. or 12 midnight to 8 a.m. Actually crediting Respondent with three-fifths of the earnings may favor Respondent because it is quite likely that many of the days that Moore worked for City Wide were Fridays (which would have been an unscheduled workday for Moore with Respondent), and her City Wide hours in the three days per week credited to Respondent's obligation were from 4 p.m. to 11 p.m. or midnight, which extended on both ends beyond what would have been her schedule of 5 p.m. to 10 p.m. with Respondent for these days. Additionally in the period of Moore's attendance at the cosmotology school, in March-July 1976, when she worked no more than 32 hours (or

4 days) per week for City Wide, General Counsel still applied the 60-40 ratio in favor of Respondent rather than a possible 50-50 ratio.

In any event, such prorating has been held by the Board and courts to be a useful and acceptable means of giving approximate credit to both the backpay respondent and the backpay claimant in connection with earnings from second or supplementary jobs of the claimant, *Lee Cylinder Division of Golay*, 184 NLRB 244, 245 (1970), enf'd 447 F. 2d 290 (C.A. 7, 1977), cert. denied 404 U.S. 1048.

The prorating of Moore's City Wide earnings and three-fifths credit to Respondent ended during the 2 quarter of 1978, when Moore commenced an entire five day week for City Wide in the early morning hours of 12 midnight to 8 a.m., which were of course entirely outside the hours she would have worked for Respondent. The job with City Wide had become, since the closing of Printz Biederman in August 1975, Moore's only second or supplementary job, and it remained such in 1979 during her reemployment of six months by Respondent.

General Counsel's backpay specification gave Respondent credit for Moore's very brief employment by, and small amount of earnings from, Snyder Sheet Metal Co. in March 1972 (exhibit GC-1g, App. C4).

However, General Counsel gave no credit to Respondent for her job with Quik Shops in the 1st, 2d, and part of the 3rd quarter, 1974 (exhibit GC-1g, App. C12, C13, C14). General Counsel contended that though the Quik Shops store was open seven days a week from 9 a.m. to midnight, Moore was required to be there only as needed, and since she was paid a salary and commissions (rather than an hourly wage), could have maintained employment with Respondent if it were available to her.

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I disagree and believe that Respondent is correct in contending that it was entitled to credit on its obligation to Moore from her Quik Shops earnings. While it may be true that Moore was not obligated to spend fifteen hours per day, seven days per week, at the Quik Shops stores, she was store manager, expected to be there a great deal of the time, and obviously on call at times when she could not be there, on a daily basis. She testified that she was at the store almost the entire time each week. Hence holding another job would have been inconsistent with her Quik Shops job if not inconceivable. Indeed she quit the job, and justifiably so, because she was obliged to spend too many hours at it for not enough pay. In contrast to the Printz Biederman and City Wide jobs, where Moore worked for limited hours wholly or partly outside hours that would have conflicted with work for Respondent, and where she was able to make adjustments of her hours as she did, the Quik Shop job was not a second or supplementary one, but her principal employment during the approximate eight month period of 1974. Moore's interim earnings from this source exceeded and eliminate any gross backpay due for the 1st and 2d quarters of 1974, and reduce the net backpay due in the 3d quarter 1974 to $8.06.

At trial (and in its briefs) Respondent sought to relitigate the issue of whether employee Moore had justifiably declined Respondent's offer of reinstatement in October 1975. I held at trial, and remain of the view, that the United States Court of Appeals for the Sixth Circuit decided that issue against Respondent in the 1978 contempt proceeding, and, accordingly, I struck portions of the Respondent's answer to the backpay specification which sought to revive the issue and to deny Moore's right to have refused the invalid offer. (Transcript pp. 139-145). Hence Respondent's argument that Moore's backpay period terminated in October 1975, when she declined to accept the invalid offer of reinstatement by Respondent, is without foundation or merit.

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VI. The Net Backpay

Compliance Officer Hehnen testified that from the back pay specification (exhibit GC-1g) the net backpay, after deductions or eliminations, due employees Barnhart and Moore in each of the calendar quarters from April 1, 1971 through February 27, 1979 appears as item 8 on the several pages of the appendices, namely, App. B1 through B34 for Barnhart, App. C1 through C32 for Moore. These items 8 total:

For employee Lena Barnhart — net backpay — $34,121.47;
For employee Carolyn Moore — net backpay — $24,846.36.

However, since in Moore's case a further credit of interim earnings from Quik Shops, in the 1st, 2d, and part of 3d quarters 1974 should be deducted, as determined under heading V above, the total net backpay should be corrected as follows:

For employee Carolyn Moore — total net backpay shown		$24,846.36
App. C12, eliminate all 1st quarter 1974, deduction	$ 922.49	
App. C13, eliminate all 2d quarter 1974, deduction	1,031.20	
App. C14, eliminate part 3d quarter 1974 by deduction	654.50	2,608.19
revised net backpay		$22,238.17

For both employees there should be added the interest at 6% (also computed quarterly) provided for in the original Board order enforced by the Sixth Circuit Court of Appeals.

In his brief, General Counsel suggested that interest be computed in accordance with the formula adopted by the Board in

Florida Steel Corporation, 231 NLRB 651 (1977), reaffirmed *in Olympic Medical Corp.*, 250 NLRB No. 11 (1980), which would provide a higher rate of interest than 6%. However the Board has held that the method for determining interest set forth in *Florida Steel* does not apply to a case in which an earlier order of the Board provided for a different rate of interest which has been enforced by a court of appeals, *Pierre Pellaton Enterprises*, 239 NLRB 1211 (1979); *Vanguard Oil and Service, Inc.*, 246 NLRB No. 22, slip op. p. 2 (1979). Hence the interest from April 1, 1971 to February 27, 1979 should be calculated at 6%.[21]

In employee Barnhart's case, since the backpay period was not ended on February 27, 1979, as a result of the improper reinstatement, followed by the constructive discharge of March 19, 1979, additional backpay is due her until she is offered, and accepts or voluntarily declines, appropriate reinstatement. While arguably this might seem to be a new order, it is in reality a continuation of the original unrequired order for reinstatement, enforced by the U.S. Court of Appeals for the Sixth Circuit and reinforced by the Court's contempt order against Respondent for failure to comply. Accordingly, interest on the additional backpay will also be at the 6% provided in the original order.

VII.

Upon the foregoing findings of fact, conclusions of law, and

[21]Compliance Officer Hehnen provided a calculation of interest at 6% for that period, if the backpay were paid by November 30, 1979, which amounted to $8,479.34 for employee Barnhart, and $6,137.55 for employee Moore. Of course a recalculation of interest is necessary in both cases to update the interest to the time of payment, and in Moore's case to recalculate as well interest on the reduced principal sum.

the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended:[22]

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to reinstate employee Lena Barnhart to her former job, or, if it no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and without discriminating against her, in regard to tenure or any term or condition of employment, because of her Union activity or testimony before the Board and courts, or because she sought or seeks Union or Board assistance in connection with her reinstatement, tenure, or conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Give backpay to former employee Carolyn Moore for the period of April 1, 1971 to February 27, 1979, in the sum of $22,238.17, with interest at 6% per annum computed on a quarterly basis to the time of payment.

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[22]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

(b) Give backpay to employee Lena Barnhart for the period April 1, 1971 to February 27, 1979 in the sum of $34,121.47 with interest at 6% per annum computed on a quarterly basis to the time of payment. Additionally, make Lena Barnhart whole for any loss of earnings since her improper reinstatement of February 27, 1979 and constructive discharge of March 19, 1979, until such time as she is properly and fully reinstated to her former job or equivalent position as set out in paragraph (c) below, or voluntarily declines such reinstatement. This additional backpay shall be computed on a quarterly basis, with interest at 6% per annum also computed on a quarterly basis to the time of payment.

(c) In keeping with the Board's original order of March 17, 1972 (195 NLRB 939), enforced by the United States Court of Appeals on December 27, 1972 (472 F. 2d 1228) and reinforced by the contempt order of the Court against Respondent on February 8, 1979, offer said Lena Barnhart immediate and full reinstatement to her former job, or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, among other things crediting her with pay increases granted employees in comparable positions while she was not working for Respondent, and refraining from imposing or threatening to impose any undue or burdensome working conditions or tasks nor regularly requested of other sales clerks.

(d) Preserve, and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain the backpay or other reimbursement due under the terms of this Order.

(e) Post in Respondent's store in New Philadelphia, Ohio,

copies of the attached notice marked "Appendix."[23] Immediately upon receipt of said notices, on forms to be provided by the Regional Director for Region 8 (Cleveland, Ohio), the Respondent shall cause the copies to be signed by one of its authorized representatives and posted, the posted copies to be maintained for a period of sixty consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 8, in writing, within twenty days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. April 7, 1981

HERZEL H. E. PLAINE
Administrative Law Judge

[23]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

THE NATIONAL LABOR RELATIONS BOARD HAVING FOUND, AFTER A TRIAL, THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT:

WE WILL NOT refuse to reinstate employee Lena Barnhart to her former job, or, if it no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and without discriminating against her, in regard to tenure or any term or condition of employment, because of her Union activity or testimony before the Board or courts, or because she sought or seeks Union or Board assistance in connection with her reinstatement, tenure, or condition of employment; and

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

Because the Board and the United States Court of Appeals for the Sixth Circuit found in 1972 that we had unlawfully discharged employee Lena Barnhart and Carolyn Moore, and because the Court further found in February 1979 that we had failed to properly or promptly reinstate both employees to their former or equivalent jobs as ordered by the Board and Court,

WE WILL pay to Barnhart and Moore, respectively, the sum found due each as net backpay with interest for the period April 1, 1971 to February 27, 1979.

Because the Board further found that on February 27, 1979, we did not properly reinstate employee Barnhart to her

Decision, dated April 7, 1981, of Administrative Law Judge Herzel H. E. Plaine, National Labor Relations Board

former or equivalent job and caused her constructive discharge on March 19, 1979,

WE WILL offer Barnhart her former job, or the equivalent if the former job does not exist, and

WE WILL give Barnhart additional backpay with interest from February 27, 1979 until she is promptly and fully reinstated or voluntarily declines proper reinstatement.

S. E. NICHOLS OF OHIO, INC.
(Employer)

Date_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 E. 9th Street — Room 1695, Cleveland, Ohio 44199 (Tel. No. (216) 293-3126).

Opinion of the United States Court of Appeals, Sixth Circuit [472 F.2d 1228 (1972)]

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

S. E. NICHOLS OF OHIO, INC., Respondent.

No. 72-1493.

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT.

Dec. 27, 1972.

Proceeding on application for enforcement of an order of the National Labor Relations Board directing an employer to cease and desist from violations of the National Labor Relations Act arising out of coercive interrogation of employees concerning union activities, promises of benefits to employees, and discharge of employees for union activities. The Court of Appeals held that substantial evidence supported findings of trial examiner and order of the Board.

Enforcement granted.

Marcel Mallet-Prevost, Asst. Gen. Counsel, Washington, D.C., Philip Fusco, Director, Cleveland, Ohio, Roger Hartley, Washington, D.C., for petitioner.

James L. Burke, Elmira, N.Y., for respondent.

Opinion of the United States Court of Appeals, Sixth Circuit [472 F.2d 1228 (1972)]

Before EDWARDS, CELEBREZZE and MILLER, Circuit Judges.

PER CURIAM.

The National Labor Relations Board seeks enforcement of its order directing respondent to cease and desist from violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

[1] The Board had found that respondent's supervisory personnel had engaged in coercive interrogation of employees concerning union activities and had made promises of benefits to employees and had discharged certain employees for union activities. While the record in this case indicates that much of the evidence was in direct conflict and that the resolution of issues of credibility was far from a simple and easy task, the record also discloses that there clearly was substantial evidence to support the findings of the trial examiner and the decision and order of the board.

[2, 3] This court does not sit to retry disputed issues of fact or to redetermine issues of credibility of witnesses. Our sole question in such a proceeding as this is to determine whether or not there was substantial evidence on the record taken as a whole to uphold the findings of fact and the order of the National Labor Relations Board. Universal Camera Corp. v. N.L.R.B. 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Enforcement of the Board's order is granted.

Decision and Order National Labor Relations Board, [195 NLRB 939 (1972)]

S. E. Nichols of Ohio, Inc. *and* Retail Clerks International Association, Local 698, AFL-CIO. Case 8-CA-6414

March 17, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On November 19, 1971, Trial Examiner Benjamin B. Lipton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exception and brief and has decided to affirm the Trial Examiner's rulings, findings,[1] and conclusions and to adopt his recommended Order, as modified herein.

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[1]In affirming the Trial Examiner's finding that employees Lena Barnhart and Carolyn Moore were discharged for engaging in protected activities in violation of Section 8(a)(1) and (3) of the Act, we rely solely on the Trial Examiner's finding that the alleged misconduct of Barnhart and Moore, which was Respondent's alleged reason for its action, did not occur and that Respondent's good faith is not a defense.

Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect, *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

In the third line of the fourth paragraph in section II, C of his Decision, the Trial Examiner inadvertently referred to a meeting as taking place on October 30. The record shows that this meeting was held on March 30. We hereby correct this inadvertent error.

Decision and Order National Labor Relations Board, [195 NLRB 939 (1972)]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, S. E. Nichols of Ohio, Inc., New Philadelphia, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

BENJAMIN B. LIPTON, Trial Examiner: Hearing in this case was held before me in New Philadelphia, Ohio, on August 27, 1971,[1] upon a complaint by the General Counsel[2] alleging violations of Section 8(a)(1) and (3) of the Act. Briefs filed by General Counsel and Respondent have been duly considered.

Upon the entire record in the case,[3] and upon my observation of the demeanor of the witnesses on the stand, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is engaged in the retail sale of general merchandise, having its principal offices and place of business in New York, New York. It operates a department store in New Phila-

[1]All dates are in 1971 unless otherwise noted.

[2]The Union's charge was filed on May 5 and served on May 7; the complaint thereon issued on June 25.

[3]The transcript contains errors and omissions too numerous to specify, but not affecting any matter of significance. No motion was received to correct the transcript.

delphia, Ohio, which is particularly involved in this proceeding. Annually, at this department store, Respondent sells products valued in excess of $500,000, and has a direct inflow of goods in interstate commerce valued in excess of $50,000.

Respondent admits, and I find, that it is engaged in commerce and that the Union is a labor organization, within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Issues and Positions*

The complaint alleges, in substance, that Respondent unlawfully—interrogated employees, singly and in a meeting at the store; made promises of benefit to an employee; threatened an employee with reprisal; and discriminatorily discharged employee Lena Barnhart and Carolyn Moore. Respondent denies all alleged violations. In defense of the discharges, Respondent affirmatively relies upon statements it obtained from certain employees that Barnhart and Moore, while soliciting authorization for the Union, "threatened" that if they did not sign a card, they would lose their jobs.

B. *Organizational Background and Chronology*

On March 23, Barnhart and Moore, sales clerks, were separately approached away from the store by union representatives concerning the prospect of organizing Respondent's employees. Each indicated she would attempt to ascertain the interests of other employees. On March 29, an evening meeting was held at Barnhart's home attended by employees Barnhart, Moore, Gladys Burgess, Hazel Barthalow, Dorothy Mamula, Bonnie Law, and Norma Milyiori. They decided to contact the Union,—a task undertaken by Barnhart. On March 30, about 1:30 p.m.,

the same employees, plus Sheila McCue, met with two union agents at Barnhart's. The employees were advised of procedures in organizing, benefits to be obtained, and were given blank authorization cards and union buttons. Each of the employees present signed a union card. When these employees reported for duty that evening, they had their union buttons openly displayed on their smocks. About 10 employees were then wearing the buttons. James E. Durda, the store manager, testified "a few employees" came to him that night and mentioned that they were solicited to sign cards. He conceded that "maybe later on," as he was "curious," he had asked Doris Holmes "who started the union drive." On March 30, March 31, and April 1, Durda held meetings in the store with separate groups of employees relating to the union campaign. On April 1, Barnhart and Moore were discharged.

C. *Restraint and Coercion*

On March 30, about 6:30 p.m., Durda summoned certain of the employees, including Barnhart, Moore, Lax, and Milyiori, to a meeting. Also in attendance were James Mitchell, district manager from New York, three assistant store managers, two office clericals, and Linda Johnson. Durda stated he was shocked to learn they were trying to organize the Union; he did not realize the problems they had in the store, and they should be free to talk to him if they had any problem. He asked each of the employees wearing a union button why she wanted a union.[4] The responses included working conditions, job security, benefits, and the manner in which Barnhart was treated by Respondent. He said he could get the employees benefits, such as 7 days of sick pay a year; they would be receiving their raises; he was working on a plan for the girls to have every other Sunday off, which would be put into effect as soon as he obtained permission; and

[4]He remarked to Moore that she "was union all along."

the Company had previously tried to get hospitalization insurance, but could not obtain enough names for a group policy. In vague and cryptic testimony, Durda indicated that these benefits were raised in questions by employees, which had "already been brought up in the past," had been "worked on," and were "nothing new."[5]

On March 31 and April 1, further meetings in the store were held with separate groups of employees,[6] similar in nature to the meeting on March 30.

Only Durda testified for Respondent concerning the meetings with employees. He stated that his purpose was to let the employees know the "do's and don'ts" relating to union organization, according to policies which he had to follow. These policies are reflected in an "Employee Handbook" given out to all employees, which is described in part below. He read "the whole book"[7] to the employees at the March 30 meeting, and questioned them as to their "problems." I find that Durda was shifting and evasive as to what he actually said to the employees regarding union organization. Whether he had asked the employees individually why they wanted the Union, Durda replied, "just Hazel Barthalow," because he had no one to relieve her at work to permit her attendance at the meeting on March 30. However, on cross-examination, he ultimately admitted the essence of the complaint allegation that he had interrogated the employees individually as to their involvement with the Union.

The complaint refers only to the meeting on March 30 and

[5]These assertions by Durda lack the necessary specificity and probity to justify the promises, in this context, on the basis that they were previous commitments by Respondents to the employees.

[6]Some 80 to 90 employees were then employed.

[7]Eleven pages of closely written material.

confines the allegation to coercive interrogation of employees. As to Durda's discussion with Barnhart following the October 30 meeting (described below), it alleges a further interrogation and promises of benefit. In addition, Durda admitted that he interrogated Barthalow in a separate conversation apart from the group meetings. The facts supporting these allegations are amply evidenced. District Manager Mitchell and other supervisors were present during the meetings, tacitly endorsing Durda's conduct. No legitimate purpose was shown for questioning these employees individually as to their reasons for wanting the Union. The answers of each employee might well have disclosed the degree of her involvement in the union campaign. Durda admittedly questioned an employee to obtain the identity of the leaders. He sought to induce the employees to abandon their efforts to unionize by inviting discussion of their "problems" and clearly offering to improve their benefits. Considered in conjunction with the other unfair labor practices herein, it is found that these interrogations, inclusive of Barnhart and Barthalow, were violative of Section 8(a)(1) of the Act.[8]

When questioned by Durda as to why she wanted a union, Barnhart also stated that she had a grievance. The grievance concerned Barnhart's insistence that she had been given a leave of absence by the previous store manager, Barnes, and that when she returned to work in October 1970, Durda deprived her of seniority and certain benefits. Durda took the position that, as far as he was concerned, "being the new manager," she returned as a new employee because when he hired her back,[9] she never said anything. Earlier in March he had made this decision clear to Barnhart. Durda asked Barnhart to come to his office after the meeting and he would make a three-way phone call to Barnes.

[8]E.g., *Blue Flash Express Inc.*, 109 NLRB 591; *Mitchell Plastics, Inc.*, 159 NLRB 1574.

[9]The date of this occurrence is not shown.

When Barnhart reported to his office, Durda again asked her why she wanted the Union in the store. Did she realize what she is doing to him? Then he said that Mitchell told him to restore her seniority, 2-weeks' vacation, sick leave, and 5 cents an hour dating from the past October. He inquired, "Now, is this what you want?" She made no reply. He asked her if she would take off her union button and she refused. As she prepared to leave, he said, "Think this over." Durda testified that he made these promises to Barnhart only if Barnes confirmed that Barnhart had been given a leave of absence. It is not indicated that Durda spoke with Barnes concerning Barnhart at any time. In other respects, Barnhart's testimony was not effectively denied. Until these events on March 30, Durda's firm position was that Barnhart was not entitled to the deprived benefits which she claimed. Barnhart is credited in her account of the conversation in Durda's office on March 30. She was promised a restoration of these benefits upon the clearly implied understanding that she would cease her union activities. The result would be the same even if Durda conditioned the promise upon Barnes' confirmation of her leave of absence. I find, therefore, that by such conduct Respondent violated Section 8(a)(1), as alleged.[10]

Mamula testified to a conversation about April 5, with her manager in the shoe department, Tom Able. Able asked her if she had engaged in the union activities and she answered, yes. He said he could not stop her if she wanted to participate. However, he told her that if either of his two girls participated in union activities, he would fire them. During the first week in May, Able approached her and first asked if he had made the latter state-

[10]As the complaint does not allege unlawful promises of benefit made by Durda in any of the group meetings with the employees, it is sufficient, in my view, to consider the evidence on this subject solely for corroborative and background purposes.

ment. She replied affirmatively. Then he said, "Dorothy, if I said that, I did not mean it that way."

Able initially denied having any conversation with Mamula about April 5 relating to union activity. In May, he asked Mamula if she had been saying that he had made the alleged threat to fire his two girls. She told him she did not remember that he made such a statement. Able heard that Mamula wore a union button.[11] Unsure whether the conversation was in early April, he conceded that he had asked her "if she was wearing one."

There is a seeming inconsistency in Mamula's testimony that Able made the alleged threat and that he also said he could not stop her from participating in union activities. Upon close study, I would assign this result to the fragmented nature of the questioning. It appears from both versions that the conversation in May arose from the fact that such a threat had been attributed to Able. In all the circumstances, I credit Mamula. Accordingly, I find that Able engaged in coercive interrogation of Mamula and issued the threat of discharge, in violation of Section 8(a)(1).[12]

D. *Discharge of Barnhart and Moore*

On April 1, about 7 p.m., Durda called Barnhart and Moore to his office. Also present were Mitchell, three assistant store managers, an office clerical and Linda Johnson. It is undisputed that Durda read to Barnhart and Moore from a document which he described as an affidavit from employee Paul Lehman, asked

[11]It was worn only on the night of March 30.

[12]Respondent contends that Able is employed by a lessee at the store and that his statements may not be imputed to Respondent. This position was not asserted, nor litigated, at the hearing. I find it without merit. It is not contested that Mamula is an employee of Respondent and that she is supervised by Able.

them if they had anything to say, discharged them, gave them their paychecks previously prepared, and ordered them to leave immediately and not come back again to the store premises. The affidavit was not shown to Barnhart and Moore. After the discharges, it was posted for the employees to see. Both testified he told them they had threatened Lehman with bodily harm. Barnhart had no comment, and Moore denied threatening Lehman in any way. During the defense portion of the hearing, Respondent advanced the position that Barnhart and Moore were terminated because they were "part of the systematic effort to and did threaten employees that they would be discharged if they did not sign the union authorization cards." Durda testified they were discharged because "they broke the Nichols' policy" by threatening Lehman, Joan Hykes, Sharon Taylor and a few others, but those are the ones he investigated. As to the "few others" on which Respondent relies, when requested to specify, Durda stated he only knew about Linda Johnson. In his "investigation," Durda did not attempt to obtain from Barnhart and Moore their version of the facts. At the discharge interview, according to Durda, he mentioned only the incidents involving Lehman and Taylor—without relating what he actually said, apart from reading the affidavit.[13] Only Durda testified for Respondent concerning this interview, and his testimony, I find, is less than clear and forthright.

As it has been raised and is intertwined with the several issues herein, it is necessary to consider the "Employees Handbook," which contains a section under the heading, "Your Employee Rights And Legal Rights Under A Union Organization Drive." Pertinent passages are as follows:

[13]While Durda denied that he referred to a threat of physical harm, the testimony of Barnhart and Moore is not otherwise clarified in the record. (Cf. the Taylor incident, *infra*) The question is not, of itself, significant to the issues. However, I cannot find that this rather unusual impression voiced by both dischargees was made up of whole cloth.

Decision and Order National Labor Relations Board, [195 NLRB 939 (1972)]

. . . we want you to be aware of one more benefit your company gives you.

We will protect all our employees from being exploited or taken advantage of by outsiders, . . . the most frequent . . . will be various Union Organizers.

* * * * *

In some cases the union representative has told an employee she'd lose her job if she didn't sign a union authorization card. If this happens to you, just don't believe it. . . .

Do not sign a card because you are told that now if you sign, you will not have to pay initiation fees, and that nonsigners will be forced to pay such fees if the Union gets certified.

The truth of the matter is if you sign a card or if you don't, all these persons will pay initiation fees or no one will pay them. . . . The above reason for getting you to sign a card is a threat and is illegal. Tell us and we shall protect you.

* * * * *

Remember, do not sign a card because you are threatened, tell us and we will protect you. It is your right to have a Union. It is your right not to have a Union. Our Company will try to see to it that your rights are preserved no matter how you choose. Tell us if someone is trying to stop your freedom of choice.

If it is an organizer, employee or store executive, contact your personnel director. . . .[14]

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[14]The pertinence of these selected portions is to show the inducement of employees to report to management any "threats" made in union solicitations. The accuracy of Respondent's legal advice to the employees is subject to serious question. However, I do not pass upon whether the statements in the handbook are coercive *per se;* no violation thereon is alleged in the complaint.

Decision and Order National Labor Relations Board, [195 NLRB 939 (1972)]

The Lehman incident occurred at a gathering at Barnhart's house on March 31, commencing at 10:15 p.m. After work, certain of the employees had decided to meet there for "pizza and pepsi." In attendance were Barnhart, Moore, Burgess, Barthalow, Milyiori, Mamula, Lax, McCue (i.e., those already shown to have previously signed cards), Althea Korns (who arrived at the end of the meeting), and Lehman.[15] In the course of the evening, while sitting around a table, some of the employees engaged in a conversation concerning the Union, the sequence of which is not entirely clear from all the testimony. Barnhart, among others, described various benefits deriving from union organization. Lehman asked if everybody had to join the Union. Barnhart replied "if it is closed shop, yet or you will lose your job, but if it is an open shop, no, you will not have to join the union." Lehman admitted that such a discussion concerning a closed shop was "how the approach was made to me about joining the union." It does not appear in her affidavit. Moore took a union card from her purse and asked Lehman if she would like to read it. After reading the card, Lehman said she would have to think it over, that she was afraid to sign as it might result in her losing her job because she was unable to run a cash register. During or preceding this general conversation, Lehman was weeping while she complained of personal difficulties in the store and at home.

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[15]Lehman testified that she asked Barnhart if she could come over that evening to return a dish she had borrowed, and Barnhart said it would be fine because her husband would be away at a basketball game. It appears that she did not bring the dish and Barnhart's husband was at home that evening. Her affidavit merely states she was invited by Barnhart. Durda testified Lehman told him she went there thinking it was a pizza party. Barnhart testified that Lehman had asked her if she could come over to watch television; she was in a hurry and gave no answer. Though involving peripheral incidents, I view this evidence as tending adversely to affect Lehman's reliability.

Lehman testified very briefly on direct. Barnhart handed her a card and proceeded to tell her that if she did not sign, she would lose her job. Moore "backed her up." Cross-examination elicited some elaboration, already described. In her affidavit, Lehman states in substance: Upon her arrival, she "was quickly advised that the group was meeting relative to the question of union organization at the store." On her refusal to sign a card and "to participate in their efforts to organize a labor union," Barnhart told her that if she refused to sign she "would subsequently lose her job." Moore "joined the threat and reiterated" she would be forced out of work if she failed to sign.

Durda testified that, in his investigation, he spoke to "the majority" of "about 10 girls" who attended the meeting. The reports he obtained indicated that none of these girls, except one, heard the alleged conversation with Lehman. Burgess and Milyiori testified they were never questioned by Durda. Mamula and Barthalow, testified that he inquired after the discharges, and they told him no such statements were made to Lehman. McCue, called by Respondent, testified that Barnhart told Lehman, "If you don't sign, when the union gets in you will be fired;" and Moore said, "That is right." McCue did not remember the exact words. She told Durda she never thought that Lehman was threatened.

Lehman impressed me as an erratic and unreliable witness, particularly in view of the conflicts and implausibilities stemming from her testimony. I find that Barnhart and Moore did not in fact make the remarks attributed to them by Lehman. In any case, as to Moore, the broad conclusion that she "backed up" Barnhart or "joined in the threat" is entirely too vague a basis upon which her discharge may reasonably by predicated. At Barnhart's home, it was explained to Lehman, in the lay language of these employees, the distinction between a "closed shop"

(or more accurately a union shop) and an "open shop." As arising from the former type of union security in the contract, she was advised of the possibility of job loss. In the "Employee Handbook," and reemphasized in Durda's group meetings, Lehman was counseled as were the employees generally—"just don't believe it"—if told that "she'd lose her job if she didn't sign a union authorization card." The employees themselves certainly could evaluate such a statement, and would know, moreover, that an employee soliciting card signatures had no possible authority to carry out a threat of discharge. Even if the remarks were made as described by Lehman, it has been held in effect that this kind of pressure from an employee soliciting union support is not coercive.[16] At the outset of the union campaign, the employees were assembled and urged by Respondent, as already prescribed in the handbook, to report any "threat" made in solicitations of union support or "if someone is trying to stop your freedom of choice." In my opinion, no employee could clearly comprehend what would constitute such a threat within the Company's admonition. It was against this background that Lehman reported to Durda the incident at Barnhart's home and an affidavit was prepared.

The general analysis as to Lehman has similar application to Taylor, Hykes, and Johnson, discussed below.

The Taylor incident. Taylor testified that Moore asked her if she was going to sign. She answered, no, and stated that anything she had to discuss she could go to Durda, which always turned out to be satisfactory. Moore then said, "I'll get you." Respondent has not articulated its interpretation of these words. As already shown, Respondent grouped this incident with others

[16] E.g., *N.L.R.B.* v. *Arrow Specialties, Inc.*, 76 LRRM 2351, 2354 (C.A. 8, 1971); *N.L.R.B.* v. *Karp Metal Products Co., Inc.*, 134 F.2d 954-955 (C.A. 2); *N.L.R.B.* v. *Dahlstrom Metallic Door Company*, 112 F.2d 756, 758 (C.A. 2).

as part of "a systematic effort" by Barnhart and Moore of threatening employees. It is my finding in the circumstances that the utterance, "I'll get you," is highly ambiguous, and cannot reasonably be regarded as a threat justifying discharge.[17]

The Hykes incident. Hykes testified that Moore asked her to sign a card, and she responded, "I don't know because I need my job because I am making car payments." Moore then stated that she might as well sign, because if she didn't sign she would lose her job anyway when the union got in. Moore related that they were walking together from the parking lot when she asked Hykes if she was interested in signing. Hykes said she would have to talk to her husband and think it over. It is noted that Durda omitted mention of this incident at the discharge interview. Moore's denial of Hykes' version is credited.

The Johnson incident. Durda testified that, on her way to the discharge interview on April 1, Johnson told him she was also threatened "by a phone call" from Barnhart and Moore that she would lose her job if she did not sign a card. Johnson's presence at the discharge interview was presumably as an observer for Respondent. She was not called to testify. I find, particularly, that Respondent's reliance upon this incident, which it concededly did not investigate, was not in good faith.

Concluding Findings

In effect, Respondent's position is rested upon a belief that Barnhart and Moore made the above-described threats to certain employees which amount to serious misconduct warranting their discharge. In all instances, the stated misconduct took place in

[17]E.g., *Corriveau & Bouthier Cement Block, Inc.*, 171 NLRB No. 113.

the context of alleged solicitations by Barnhart and Moore of union authorization cards, a basic protected activity under Section 7 of the Act.[18] The essential law involved is well defined in *N.L.R.B.* v. *Burnup & Sims*, 379 U.S. 21. Section 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity despite the employer's honest belief, when it is shown that the misconduct never occurred. "A protected activity acquires a precarious status if innocent employees can be charged while engaging in it, even though the employer acts in good faith." *Id.* at 23. Respondent's defense must fall on several grounds, each of which is alone sufficient: (1) The asserted misconduct did not occur; (2) it does not constitute misconduct reasonably justifying discharge even if it did occur; (3) Respondent did not harbor an honest or good-faith belief as to (1) or (2) above; and (4) the true reason for the discharge of Barnhart and Moore was their union activity and leadership. On items (1) and (2), the findings have been shown, *supra*. That Respondent conducted itself in bad faith is evident throughout the record. Such factors may be noted, among others, that Respondent did not attempt to consult Barnhart and Moore in its investigation of the charges against them; Durda did not credibly describe the results of his investigation, which strongly tended to corrobrate Barnhart and Moore; paychecks were prepared in advance, and the decision to discharge was fixed before the final interview; Barnhart, and Moore were not advised at the discharge interview of all the incidents upon which Respondent relies; it was unreasonable for Respondent to characterize and treat the alleged conduct as "threats," particularly in light of statements in the "Employee Handbook"; the punishment was summary and drastic *vis-à-vis* the asserted offense; and Respondent's animus is revealed, *inter alia*, by the contemporaenous unfair labor practices it committed. Barnhart and Moore were the outstanding or-

[18] *Ibid.*

ganizers of the Union among Respondent's employees. That Respondent was aware of this fact may reasonably be inferred from its course of interrogations, its attempt to learn the identity of the instigators, and its investigation of the Lehman incident. When union buttons were shown at the store, Respondent immediately convened meetings with the employees in an obvious effort, by coercive means, to abort the union movement. Then followed, in a significant brevity of time, the discharge of Barnhart and Moore.

Upon all the foregoing and the entire record, it is concluded that the discharge of Barnhart and Moore independently violated each of Section 8(a)(1) and (3) of the Act.

III. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. A broad order appears warranted particularly by reason of the discriminatory discharges which go "to the very heart of the Act."[19]

It has been found that Respondent discriminatorily discharged Lena Barnhart and Carolyn Moore. It will therefore be recommended that Respondent offer these employees immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings suffered by reason of the discrimination

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[19] *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426; *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4).

against them,[20] by payment to them of a sum of money equal to that which they normally would have earned, absent the discrimination, less net earnings during such period, with backpay computed on a quarterly basis in the manner established in *F. W. Woolworth Company*, 90 NLRB 289. Backpay shall carry interest at the rate of 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It will be further recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay due and the rights of reinstatement under the terms of these recommendations.

Because of its continuing effect on the employees, it is also necessary, in my opinion, to consider for remedial purposes Respondent's utilization of the "Employee Handbook" dealing with union organizational activities, described *supra*. The matter was fully litigated and shown to be inseparably interwoven with unfair labor practices committed, particularly the discharge of Barnhart and Moore. In the form of its language, and as verbally emphasized by Store Manager Durda during the group meetings following the first appearance of union activity, the employees were urged to report to Respondent any "threats" arising from employee solicitations of union support, which threats are vaguely or incorrectly defined in the document. The necessary tendency—and indeed as I find the calculated purpose—was to cause employees to inform Respondent of the protected union activities of their fellow employees, thereby instilling fear of re-

[20]If Barnhart was in fact given a leave of absence by the former store manager, Barnes, a matter to be ascertained in the compliance stage of this proceeding, she is entitled to the seniority and benefits of which she was deprived upon her return to work under Store Manager Durda, since Durda conceded such entitlement, but conditioned restoration upon her abandonment of support for the Union.

prisal, realistically exemplified in this case, and generally inhibiting such activities. It shall therefore be recommended that Respondent cease and desist from requesting employees, orally or in writing, to inform or report to Respondent concerning the union or concerted activities of fellow employees which are of a protected character under the Act.[21]

Upon the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Lena Barnhart and Carolyn Moore on April 1, 1971, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing, and by other acts and conduct interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aftersaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[21]See, e.g., *H.W. Elson Bottling Company*, 155 NLRB 714.

Upon the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[22]

ORDER

Respondent, S.E. Nichols of Ohio, Inc., New Philadelphia, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities; coercively promising or granting benefits to employees; or threatening employees with discharge or other reprisal to discourage union membership or support.

(b) Requesting employees, orally or in writing, to inform or report to Respondent concerning the union or concerted activities of fellow employees which are of a protected character under the Act.

(c) Discouraging membership in Retail Clerks International Association, Local 698, AFL-CIO, or in any other labor organization, by discharging employees, or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment.

(d) In any other manner interfering with, restraining, or coering employees in the exercise of their rights guaranteed in Section 7 of the Act.

[22]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Lena Barnhart and Carolyn Moore immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the matter set forth in "The Remedy" in the Trial Examiner's Decision.

(b) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents all payroll and other records, as set forth in "The Remedy" section of the Trial Examiner's Decision.

(d) Post at its New Philadelphia, Ohio, store, copies of the notice attached hereto as "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 8, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure the said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director of Region 8, in writing, with-

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[23]In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in 20 days from the date of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[24]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a trial, in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice; and we intend to carry out the order of the Board, and abide by the following:

WE WILL NOT ask you anything about a Union, or who is in the Union, in a manner which would coerce you regarding your rights under the Act.

WE WILL NOT promise or grant you employment benefits to keep you from joining or supporting a Union.

WE WILL NOT threaten you with discharge, or punish you in any way, in order to stop you from joining or helping a Union.

WE WILL NOT, orally or in writing, request that you inform or report to us concerning the union solicitations or activities of fellow employees which are of a protected character under the law.

[24]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Decision and Order National Labor Relations Board, [195 NLRB 939 (1972)]

WE WILL NOT discharge, or otherwise, punish you, in order to discourage membership or support for Retail Clerks International Association, Local 698, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of the rights guaranteed employees in the National Labor Relations Act, which are as follows:

To engage in self-organization;
To form, join or help unions;
To bargain collectively through a representative of their own choosing;
To act together for collective bargaining or other mutual aid or protection;
To refuse to do any or all of these things.

Since it has been found that we unlawfully discharged Lena Barnhart and Carolyn Moore—WE WILL offer them back their regular jobs or, if those jobs no longer exist, we will give them substantially equivalent jobs; and WE WILL pay them for the earnings they lost because of the discrimination against them, plus 6 percent interest.

S.E. Nichols of Ohio, Inc.
(Employer)

Dated By
(Representative) (Title)

Note: WE WILL notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

Decision and Order National Labor Relations Board, [195 NLRB 939 (1972)]

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1695 Federal Office Building, 1240 East 9th Street, Cleveland, Ohio 44199, Telephone 216 522-3715.

Office-Supreme Court, U.S.
FILED
SEP 26
ALEXANDER L. STEVAS,
CLERK

No. 83-86

In the Supreme Court of the United States

OCTOBER TERM, 1983

S.E. NICHOLS OF OHIO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner constructively discharged employee Lena Barnhart because of her protected activities.

2. Whether substantial evidence supports the Board's finding that employee Barnhart made reasonable efforts to obtain alternative employment.

3. Whether petitioner was denied due process by exclusion of certain evidence from the unfair labor practice hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 704 F.2d 921. The Decision and Order of the National Labor Relations Board (Pet. App. 8a-70a) is reported at 258 N.L.R.B. 1.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1983. The petition for a writ of certiorari was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et. seq.*, are set forth at Pet. 2-3.

STATEMENT

1. The pertinent facts, as summarized in the administrative law judge's (ALJ's) opinion, are as follows. Petitioner operates a discount department store in New Philadelphia, Ohio. In 1970, petitioner employed Lena Barnhart as a clerk in its men's wear department.[1] Barnhart led a Union organizing campaign in 1971, and on April 1, 1971, petitioner dismissed her. On March 17, 1972, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging Barnhart because of union activities, and ordered petitioner to reinstate her to her former job and provide backpay.[2] The court of appeals enforced the Board's order in full on December 27, 1972.[3] In July 1973 and again in March 1975, petitioner offered to reinstate Barnhart, but both times assigned her exclusively to scrubbing and cleaning duties instead of the clerk's position she had held during her original tenure. Rather than accept demotion by continuing to work at these menial tasks, Barnhart on both occasions left petitioner's employment after a brief period. In 1978, the Board instituted contempt proceedings against petitioner for its failure to comply with the court's 1972 order. On February 8, 1979, the court of appeals directed petitioner to purge itself of contempt by offering full reinstatement to Barnhart and by refraining from imposing

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[1] Barnhart was originally hired by petitioner on November 19, 1969, four days after the store was opened. Subsequently, she requested and was granted leave to care for an ill son. She returned to work in October 1970. (Pet. App. 24a-25a.)

[2] 195 N.L.R.B. 939 (Pet. App. 73a-95a).

[3] 472 F.2d 1228 (Pet. App. 72a).

undue or burdensome conditions or tasks upon her.[4] (Pet. App. 9a-10a n.3, 24a-26a.)

Barnhart returned to work at petitioner's store on February 27, 1979. Although the men's wear clerk position she held prior to her unlawful discharge still existed, she was not reinstated to that job (Pet. App. 29a). Instead, Barnhart was rotated between the lamp department and the front registers during her first two weeks back on the job (Pet. App. 30a; A. 230).[5]

On March 12, 1979, after Barnhart had worked in the lamp department and at the front cash registers for about two weeks, Assistant Manager James Dill asked Barnhart to work for a week in the housewares department to put the place in order (Pet. App. 30a; A. 231, 232, 1029). As Dill later explained, Barnhart "was kind of a free girl [who] didn't have any particular place to go * * *" (Pet. App. 34a; A. 1029). When Barnhart began to work in the housewares department, it was highly disorganized. Merchandise and boxes were on the floor and the stock on the shelves was in disarray. Barnhart straightened the shelves, stocking items which were on the floor and putting merchandise where it belonged. (Pet. App. 30a, 35a; A. 232-234.)

On Thursday, March 15, Barnhart arrived at work and found another nonsupervisory employee, Paula Powers, checking in a new order in the housewares department. Barnhart offered to assist Powers, but her offer was refused (Pet. App. 30a; A. 234). Shortly thereafter, Powers instructed Barnhart to stock the new merchandise she had checked in. Barnhart declined Powers' directive and spoke with Assistant Manager Robert Hathorn about nonsupervisory employees giving her orders. (Pet. App. 30a; A. 234-236, 883-884.)

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[4] 592 F.2d 326.

[5] "A." references are to the appendix in the court of appeals.

Hathorn evaded the issue because he viewed Barnhart as a "special situation" (Pet. App. 30a), who had returned to work under a court order (A. 894-895). Five minutes later, Barnhart went back to work, cleaning and reorganizing the housewares department (Pet. App. 30a-31a; A. 236). On Saturday, March 17, Dill told Barnhart she had been doing a "marvelous" job in the housewares department, and offered her a housewares position on a regular basis (Pet. App. 31a; A 237-238). Barnhart accepted the offer, stating that she found the work in the housewares department a "challenge" (Pet. App. 31a; A. 237-238, 391).

The next day, Saturday, March 17, Barnhart again worked in the housewares department and at the front cash registers. On Sunday, Barnhart worked in place of a sick employee at the front registers (Pet. App. 31a; A. 240-241). On Monday, March 19, a lamp department clerk, Francis Kee, told Barnhart that she was to return to the lamp department. Barnhart questioned Kee's order, observing that it was odd for a fellow employee to have more authority than Assistant Manager Dill who had told Barnhart on Saturday that she would work regularly in housewares. Kee replied that she was conveying an order from Store Manager Robert Ricer. Barnhart went to the lamp department and began to perform a set of chores listed for her by Kee, including cleaning and dusting tables, lamps, shelves, mirrors, and picture frames. When she finished with the listed assignments, she contacted Assistant Manager John Caravati, and asked whether she should return to the housewares department. Caravati instead told Barnhart that he would show her how to put the lamp stockroom in order (Pet. App. 32a-33a; A. 241-243, 899-900).

While Barnhart and Caravati were standing on the sales floor talking, Ricer approached them. Ricer reproached Barnhart for taking lengthy breaks, speaking to her in angry tones, audible to anyone within earshot

(Pet. App. 33a, 35a). Ricer's usual practice was to take employees aside to reprimand them concerning minor infractions (Pet. App. 36a; A. 243-245, 412-413, 806, 863-864). Ricer reprimanded Barnhart for taking 14 to 20 minute breaks when she was entitled to only 10 minute breaks (Pet. App. 33a, 35a; A. 243, 408, 801, 901). Although the time card allegedly showing a 20 minute break was ambiguous (Pet. App. 36a; A. 1562), Ricer did not permit Barnhart an opportunity to explain. Ricer concluded his reprimand by ordering Barnhart to stay in the lamp department, and not to leave it for any reason. (Pet. App. 33a; A. 243-244 410-411.) As Barnhart attempted a reply, Ricer told her to take the chewing gum out of her mouth (Pet. App. 33a; A. 243). Testimony showed that other employees took long breaks or chewed gum and were not disciplined (Pet. App. 35a-36a; A. 132-134, 244). Upset by her treatment, Barnhart clocked out and left the store (Pet. App. 33a; A. 244).

2. The ALJ found, *inter alia*, that petitioner violated Section 8(a)(1), (3) and (4) of the Act, 29 U.S.C. 158(a)(1), (3) and (4), by constructively discharging Barnhart on March 19, 1979. The Board affirmed (Pet. App. 9a).

The ALJ found that Barnhart was subjected to disparate treatment by being moved from place to place and treated as "a utility girl assisting other employees" (Pet. App. 34a-35a) and by being subjected to discipline not meted out to other employees (Pet. App. 35a-36a). He concluded that (Pet. App. 37a):

> By reason of its [anti-union] animus, [petitioner] was making icily clear that there was no way that employee Barnhart could expect to be restored to equal treatment with her peers among the employees. [Petitioner] was treating Barnhart in a manner designed to cause her to quit.

3. The Board also found that petitioner owed Barnhart backpay of $34,121.47 plus interest, for the period April 1, 1971, to February 27, 1979 (Pet. App. 12a).[6] In so holding, the Board rejected petitioner's contention (Pet. App. 44a) that Barnhart failed to make reasonable efforts to find interim employment.

The ALJ noted that Barnhart had registered weekly with the Ohio Bureau of Employment Services until her benefits ran out and then registered monthly (Pet. App. 46a). He also noted (Pet. App. 49a) that in the almost 8-year period involved, Barnhart "made about 500 tries at obtaining employment" (Pet. App. 55a) and contacted "more than 150 different employers" (Pet. App. 49a). The ALJ rejected petitioner's contention (Pet. App. 51a) that Barnhart's efforts were not reasonable because "she did not make use of newspaper help wanted advertisements, or hire a private employment agency * * *." He noted that Barnhart had been unaware of the fact that employment agencies might charge a fee to prospective employers and not to the applicant (Pet. App. 50a). He further noted that Board precedent does not require use of newspaper ads and pointed out that, although some of the employers whom Barnhart had contacted personally had placed newspaper ads, none offered jobs to Barnhart. Barnhart had, moreover, used newspaper ads on at least one occasion, unsuccessfully (Pet. App. 52a-54a).

4. In one significant respect, the Board modified the ALJ's recommended Order. Citing its rule that "repeat offenders and egregious violators of the Act" are subject to "broad injunctive relief" (Pet. App. 9a n.3, quoting *NLRB* v. *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357, 1357 (1979)), and finding that petitioner's repeated delays in compliance with Board and court orders

[6] Because petitioner constructively discharged Barnhart in 1979, her backpay continues to run until she is properly and fully reinstated (Pet. App. 11a, 36a-37a).

"clearly demonstrates [petitioner's] disregard for the rights of its employees and its contempt for the National Labor Relations Act and the decisions and orders of the National Labor Relations Board and the U.S. Court of Appeals for the Sixth Circuit" (Pet. App. 9a n.3), the Board, acting sua sponte, modified the ALJ's recommended Order to include broad injunctive language (*id.* at 12a-13a).

5. The court of appeals, in a per curiam opinion, upheld the Board's decision and enforced its order (Pet. App. 7a). The court found that "the administrative record offers ample support for the findings of fact and credibility determinations which underlie the conclusion that [petitioner] 'constructively discharged' Barnhart in March 1979" (Pet. App. 5a).

ARGUMENT

Petitioner challenges the decision below on three grounds: (1) that Barnhart was not constructively discharged; (2) that Barnhart did not undertake "reasonable efforts" to obtain interim employment and thus is not entitled to the full backpay award; and (3) that certain evidence was erroneously excluded from the hearing record. These issues are entirely fact-bound or lie within the discretion of the Board, subject to review by the court of appeals. Further review by this Court is unwarranted.

1. In contending that Barnhart was not constructively discharged, petitioner essentially questions the Board's factual finding, upheld by the court of appeals, that Barnhart was improperly denied a permanent assignment and that the de facto "utility girl" position to which she was consigned was not equivalent to her former position (Pet. 10-19). "The crux of the issue," as the court of appeals observed (Pet. App. 4a), is "the proper interpretation of the testimony introduced at

the administrative hearing."[7] The record reveals conflicting testimony concerning many of the events at issue. The ALJ, judging credibility and evaluating the weight of evidence, adopted one interpretation of the evidence. His findings and conclusions have been reviewed and affirmed by the Board and the court of appeals. Petitioner advocates a different interpretation of the evidence (see Pet. 14-19). There is no need for further review of these purely factual questions by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Petitioner's claims that the ALJ was motivated by "bias" or "prejudice" (Pet. 15, 17 n.6),[8] that the Board "refused to objectively consider the substantial evidence presented by [petitioner]" (*id.* at 19), and that the court of appeals "ignored the significant evidence" (*id.* at 9, 20) are without merit.[9]

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[7] Petitioner's argument relies in large part on challenges to the credibility findings of the Board (Pet. 15, 15-16, 22). However, it is "the Board's function and not [the court's] to resolve questions of fact and credibility when there is conflict in the testimony." *NLRB* v. *Rawac Plating Co.*, 422 F.2d 1259, 1260 (6th Cir. 1970); see also *NLRB* v. *Cement Transport, Inc.*, 490 F.2d 1024, 1029 n.5 (6th Cir.), cert. denied, 419 U.S. 828 (1974).

[8] Petitioner's allegations of bias are based on nothing more than the "feeling that the trier of fact, be he baseball umpire, trial judge or hearing officer, is biased." *NLRB* v. *Lewisburg Chair & Furniture Co.*, 230 F.2d 155, 156 (3d Cir. 1956); see *NLRB* v. *Pittsburgh S.S. Co.*, 337 U.S. 656 (1949). The allegations of bias were specifically considered and rejected by the Board (Pet. App. 9a n.2).

[9] To the extent that petitioner contends that the requirement to consider the record as a whole means that the Board must expressly cite all the evidence supporting its conclusions or rebut every contention raised by the charged party, the substantial evidence rule imposes no such requirement. See *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108, 1112-1113 (1st Cir. 1975); *Trumbull Asphalt Co. of Delaware* v. *NLRB*, 314 F.2d 382, 383 (7th Cir.), cert. denied, 374 U.S.. 808 (1963), citing *United States* v *Pierce Auto Freight Lines*, 327 U.S. 515, 529 (1946).

In any event, the Board's finding is amply supported by the record. Barnhart, who had held a permanent position as clerk in the men's wear department before her improper discharge, was, upon "reinstatement," shifted from department to department, despite being promised a permanent position in housewares, was given instructions by non-supervisory employees, and was singled out for public reprimand. As the ALJ found, petitioner's treatment of Barnhart was an effort to "let[] [her] know that she was just a utility girl assisting other employees" (Pet. App. 35a)—not a co-equal clerk with a permanent responsibility.[10]

2. The General Counsel's burden in a backpay proceeding under the Act is limited to showing the gross backpay an employee would have earned if the employer had not violated the Act. An employer can reduce its backpay liability by establishing, as an affirmative defense, that the employee incurred a willful loss of earnings by failing to search for alternative employment. *NLRB* v. *Reynolds*, 399 F.2d 668, 669-670 (6th Cir. 1968). However, an employer cannot prove a failure to mitigate merely by showing that the employee might have achieved higher interim earnings. The employee is required only to make reasonable efforts to mitigate loss of income. So long as such efforts are reasonable, the employee is not held to "the highest standard of diligence." *NLRB* v. *Arduini Manufacturing Corp.*, 394 F.2d 420, 423 (1st Cir. 1968). Petitioner does not dispute these settled principles. Rather, it contends (Pet. 22-26) that Barnhart did not make a reasonably diligent search for interim employment during the backpay period. This issue also turns on the facts of this particular

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[10] *Portable Electric Tools, Inc.* v. *NLRB*, 309 F.2d 423 (7th Cir. 1962), relied on by petitioner (Pet. 21), is simply an application of the same legal standards employed by the court below to a different record.

case and raises no issue warranting review by this Court.

In any event, the record amply supports the Board's finding that Barnhart's efforts to seek employment were reasonable. The record establishes that Barnhart, who was 43 when she was discharged in 1971, a woman of limited education and little job experience, skill, or training, made about 500 attempts at obtaining employment during the backpay period (Pet. App. 55a), an average of more than one attempt per week (*ibid.*).[11] She also sought employment through the Ohio Bureau of Employment Services (Pet. App. 46a). Petitioner pointed to no specific job opening that Barnhart could have obtained through a more diligent search of employment. Rather, petitioner's argument that Barnhart could have made more successful efforts is, as the ALJ concluded (Pet. App. 51a), merely "speculation and assumption that does not carry [petitioner's] burden of proof to show willful failure of the claimant to mitigate damages."

3. Petitioner's final contention (Pet. 27-30) that it was denied due process by virtue of the ALJ's refusal to admit evidence or issue subpoenas regarding Barn-

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[11] In *NLRB* v. *Flite Chief, Inc.*, 246 N.L.R.B. 407, 410-411 (1979), enforced in pertinent part, 640 F.2d 989 (9th Cir. 1981), relied on by petitioner (Pet. 24-25), the employee made attempts at employment only once a month and lied about a job which she did obtain. The ALJ found that the infrequency of her attempts to obtain work, "coupled with [her] lack of candor in testifying about the single interim job that she did secure" showed a lack of an honest attempt to secure interim employment. In *NLRB* v. *Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014, 1018 (9th Cir. 1979) (Pet. 25), the employee looked for work an average of three times a month over a nine month period while spending a considerable amount of time promoting an employees' association. Barnhart's sustained efforts to find work over an eight-year period plainly exhibit greater diligence than was shown by the employees in the above-cited cases.

hart's withdrawal and subsequent refiling of her unfair labor practice charge is without merit.

It is well established that the ALJ may, in his discretion, refuse to admit evidence, permit testimony, or issue subpoenas where he deems the evidence in question to be cumulative or irrelevant. *NLRB* v. *Tonkawa Refining Co.*, 452 F.2d 900, 903 (10th Cir. 1971). In this case petitioner had full opportunity to cross-examine Barnhart to expose any doubts or uncertainties she may have had concerning her case. The ALJ was within his discretion to exclude additional irrelevant questioning about her filing and withdrawal of an earlier charge. The withdrawal of an unfair labor practice charge does not warrant an adverse inference against the charging party; a charge may be withdrawn pending private settlement efforts or further investigation, or for many other reasons. The ALJ similarly acted within his discretion in denying petitioner's motion to subpoena and question the Regional Director regarding his investigation of Barnhart's case and his motives for dealing with it as he did. Most, if not all, of the information sought is protected by the attorney work product privilege. *J.H. Rutter Rex Mfg. Co.* v. *NLRB*, 473 F.2d 223, 233-234 (5th Cir.), cert. denied, 414 U.S. 822 (1973). Petitioner has shown no reason to believe that it was prejudiced by exclusion of any nonprivileged material. See *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981-982 (9th Cir.), cert. denied, 389 U.S. 913 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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